

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM

April 16, 1923. to April 15, 1924.



Compiled and Edited by
FRANCIS X. BUSCH
Corporation Counsel

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PREFACE.

In 1897 a volume of Opinions of the Corporation Counsel and Assistants was published under the supervision of William G. Beale, Esq., who was at that time Corporation Counsel of the City of Chicago. It contained selected opinions rendered during his administration, and also such opinions as were considered of value at that time that were preserved in the records of the Law Department from the time of the Great Fire. It was found that the preservation of important opinions in book form, so as to make them accessible to the legal forces of the city and to others looking for light on municipal subjects, amply justified the expense of such publication.

After the first volume was issued, each succeeding administration, with one exception, published selected opinions covering the period of the mayoralty term in which they were rendered. There were none printed until very recently for the two years during which Hon. James Hamilton Lewis was corporation counsel, 1905-7. Regret was expressed in the prefaces of succeeding volumes that there was such an unfortunate omission. This has been corrected by the recent publication of a volume containing opinions written during that time which are still of interest and value.

The present volume is one of two covering opinions that have been rendered during the administration of the present Mayor, Hon. William E. Dever. This volume covers the period from April 16, 1923, to April 15, 1924, inclusive, and the following volume, prepared simultaneously, will include opinions written from April 16, 1924, to April 15, 1925.

With the publication of these two volumes substantially all opinions of present importance which have been rendered by the Department of Law since 1872 are made available. In all there are thirteen volumes which will be supplemented by the publication in one additional volume of a general index to the entire series. This index volume is practically

completed and should be ready for distribution not later than January 1, 1926.

The work of selecting the opinions printed in the volumes now appearing and the preparation of same with appropriate headings and index has been under the immediate supervision of Mr. Albert H. Veeder, who was a member of the corporation counsel's staff during a part of the preceding administration as well as the present, and who, though desiring to retire sooner, remained in the department long enough to get the work into print.

In the compilation of these two volumes the same plan obtains as has been followed heretofore. Duplication has been avoided, so far as possible, and each opinion printed is believed to be directly in point on current questions.

It is to be hoped that the opinions in these two volumes, supplementing as they do, the eleven volumes that have preceded them, will add to the value of a series of books which may properly be regarded as one compilation.

FRANCIS X. BUSCH,

Corporation Counsel.

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Chicago, April 15, 1925.

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM

APRIL 16, 1923 TO APRIL 15, 1924.

[Note—The writing of the first three opinions in this book precedes the period covered by this volume, but while written under date of January 19, 1923, they were not made public until later.]

**Right of the City to Require the Chicago Tunnel
Company to Remove or Relocate Its Tunnels.**

January 19, 1923.

MR. R. F. KELKER, JR., Chief Engineer of Committee on
Local Transportation of the City Council of the City
of Chicago.

Dear Sir:

Under date of the 15th instant you requested our opinion on: "The right of the City to require the Chicago Tunnel Company to remove or relocate any interfering portions of its structure at its own expense, should the City construct a subway to be used in whole or in part for street railway purposes."

We have examined the following ordinances of the Illinois Telephone and Telegraph Company and its successor, the Chicago Tunnel Company, which we have found in the

“Special ordinances of Chicago, 1915,” and in the journals of the council proceedings since that date:

- (a) An ordinance to the Illinois Telephone and Telegraph Co. passed February 20, 1899, and accepted April 24, 1899. (See Spec. Ord. p. 1866.)
- (b) An ordinance to the same company passed July 15, 1903, amended July 20, 1903, and accepted October 5, 1903. (See Spec. Ord. p. 1871.)
- (c) An ordinance (amending the ordinance passed July 15, 1903, as amended July 20, 1903) passed February 1, 1909, and accepted March 12, 1909. (See Spec. Ord. p. 1881.)
- (d) An ordinance (amending the ordinance passed July 15, 1903, as amended July 20, 1903) passed June 28, 1909, and accepted July 30, 1909. (See Spec. Ord. p. 1884.)
- (e) An ordinance forfeiting the telephone privileges of the Chicago Tunnel Co. passed December 20, 1916. (See p. 2625 Coun. Jour. 1916-1917.) Note: This ordinance was rendered ineffectual by later ordinance authorizing sale of telephone system to the Chicago Telephone Company.
- (f) An ordinance providing for the surrender by the Chicago Tunnel Co. of its license to operate a telephone system in its tunnels passed July 6, 1917, and accepted July 17, 1917. (See p. 1031 Coun. Jour. 1917-1918.)

Section 2 of the ordinance passed July 15, 1903, in part reads as follows:

“Said company, in consideration of the rights and privileges granted by this ordinance, shall lower all tunnels or conduits already constructed, so that the crown thereof shall not be less than nineteen feet below city datum, as hereinbefore mentioned, when ordered so to do by the Mayor or City Council. *And the City hereby reserves the right to compel any tunnels, conduits or manholes constructed under this or said prior ordinance to be lowered, altered or removed in case such lowering, alteration or removals shall be necessary for the construction of any water tunnels or any subways which the City may determine upon, by ordinance, provided said subways are to be used in whole or in part for street railway purposes.*”

This provision is in full force and effect, not having been modified or changed by any of the later ordinances.

In our opinion the City has authority to require the Chicago Tunnel Company to remove or relocate at its own expense any portion of its tunnels or conduits which may interfere with the construction by the City of a subway used in whole or in part for street railway purposes.

It is to be remembered that on February 19, 1929, all tunnels and conduits constructed under the above mentioned ordinances shall, without the payment of any further consideration by the City, become and be the absolute property of the City, and the company agreed to promptly vacate same. (Sec. 1 of Amendatory Ordinance of July 15, 1903.)

Respectfully submitted,

STEPHEN A. FOSTER,
JEROME N. FRANK,
WM. H. SEXTON,

*Special Assistant Corporation Counsel
Assigned to the Committee on Local
Transportation.*

**Right of the City to Compel Occupants to Vacate
Sub-Sidewalk Space If City
Constructs a Subway.**

January 19, 1923.

MR. R. F. KELKER, JR., Chief Engineer of Committee on
Local Transportation of the City Council of the City
of Chicago.

Dear Sir:

In your letter of January 15, 1923, you asked for our opinion on the following question: "The right of the City to compel occupants of sub-sidewalk space to vacate such space if the City constructs a subway which requires the full width of the street between lot lines.

Our answer is:

- (1) That the City has such right, and
- (2) That the City will not have to pay any compensation to the abutting property owners who are so compelled to vacate.

The Supreme Court of Illinois within recent years has considered at length the rights of abutting property owners in the sub-surface portions of the streets. The case of *People v. Marshall Field & Co.*, 266 Ill. 609, involved the validity of an ordinance authorizing that company to construct a passageway under Washington Street connecting its two stores. The cases of *Sears v. City of Chicago*, 247 Ill. 204; *Tacoma Safety Deposit Co. v. Chicago*, 247 Ill. 192; *Illinois Trust & Savings Bank v. Chicago*, 247 Ill. 264, and *Ryerson v. City of Chicago*, 247 Ill. 185, dealt with the ordinance of February 5, 1906, requiring abutting property owners to pay compensation to the City for the use of sub-sidewalk space.

In the latest of the decisions above cited (*People v. Marshall Field & Co.*, 266 Ill. 609), Mr. Justice Carter in delivering the unanimous opinion of the court said:

“No absolute or iron-clad rule can be laid down with reference to what encroachments or obstructions upon the street can be permitted by the municipality. The question, by the great weight of authority, always comes back to the point, are these obstructions or encroachments unreasonable and against the public interests? (3 McQuillin on Mun. Corp., Sec. 1334.) The courts, in applying the rules of law to questions of this nature, should not permit the streets to be used in such a manner as to prejudice the rights of abutting owners while at the same time fully safeguarding all the rights of the public therein. These public rights do not depend upon the methods of travel recognized at the time the streets were opened or such public uses as have been sanctioned by long continued custom and acquiescence. The use of the streets must be extended to meet the new needs of locomotion, both above and below the surface of the ground. The public uses to which a city street

may be applied cannot be limited by arbitrary rules, but must be extended to meet public wants and necessities occasioned by the enlarged uses to which the abutting property is devoted. (3 Dillon on Mun. Corp., 5th Ed. Sec. 1155; *Molway v. City of Chicago*, 239 Ill. 486.) The right of the public in the city streets necessarily includes every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper. The original owners of the lands in the great cities of our country did not foresee the growth of population and business which has caused property owners in such cities to erect buildings twenty stories or more in height and to excavate under them basements, cellars and sub-cellars; nor was it anticipated that the surface of the streets would be insufficient for the use of the people, either in the transaction of business or in the pursuit of pleasure. 'Our system, which leaves to the land-owner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface, as well as upon it, in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equaled, if it has not surpassed, the increase of requirements for business along the streets.' (*Sears v. Crocker*, 184 Mass. 586.) This court, in holding that the City of Chicago could contract for the building of street railways in subways, stated that it was not improbable that in that city, in order to have a complete system of such railways, it would become necessary not only to build them upon but above and below the surface of the streets. *Barsaloux v. City of Chicago*, 245 Ill. 598.

* * *

"This court has stated that cities, in controlling and improving streets, are charged with the unquestioned duty of preparing them for public use at such time and in such manner as the public necessities may require; that, holding the streets in trust for the public, the city authorities cannot convey or divert them to other uses by granting to corporations or individuals

rights or easements in the streets which interfere with the duty of preparing them for public use or to meet the public necessities; that in administering the trust the city cannot voluntarily place it beyond its power to discharge its duties herein. (*City of Quincy v. Jones*, 76 Ill. 231; *Matthiessen, etc., Zinc Co. v. City of La Salle*, 117 id. 411.) * * *

“Cases more nearly similar in facts to the situation we are asked to pass upon here, are those that have to do with the regulation by the city of the use of a portion of the street underneath the surface. A property owner cannot claim the absolute right to take up his sidewalk and extend his coal cellar under it, but this right may be granted by the public authorities in such a manner as not to interfere with the rights of others or of the public. (*Nelson v. Godfrey*, 12 Ill. 20.) A city, under special legislative authority as well as its general power, may grant permits for the building of vaults under the streets and sidewalks and require such compensation for the privilege as it may deem reasonable and just, the general doctrine being, that municipalities, under the power of exclusive control of streets, may allow any use of them consistent with the public objects for which they may be held. (*Gregsten v. City of Chicago*, 145 Ill. 451.) This, however, can only be done when the paramount right of the public to the full, free and safe use of the street in all of its parts is not thereby infringed upon. (*West Chicago Masonic Ass’n v. Cohn*, 192 Ill. 210.) * * *

“This court has quite recently had before it for consideration the respective rights of abutting property owners, the city authorities and the public with reference to the use of the space under the surface of the streets, both when the fee was owned by the city and when it was owned by the abutting property owners. In those cases it was decided that the rights of the abutting owners as to the space in the street beneath the surface, when owning the fee in the street, were greater than when the fee was in the city; that when the abutting lot owner was the owner of the fee he had the right to make any reasonable use of the street which did not interfere with the free enjoyment of the public easement therein, whereas when the city owned the fee the abutting lot owner had no rights in it except as granted by the municipality; that in any event, whether

the fee title was in the city or the abutting property owner, the street under the surface of the ground could only be used in such a manner as would safeguard the paramount right of the public to the full and unobstructed use of the street for the purpose for which it was dedicated; that the city would not be estopped by any action of its own from requiring the space occupied beneath the street to be surrendered to the city whenever it became necessary for the uses of the public. (*Ryerson v. City of Chicago*, 247 Ill. 185; *Tacoma Safety Deposit Co. v. City of Chicago*, *id.* 192; *Sears v. City of Chicago*, *id.* 204; *Illinois Trust & Savings Bank v. City of Chicago*, *id.* 264.) * * *

“Keeping clearly in mind the exact question that was involved in each of the different cases, we do not think there is any serious conflict in any of them in this State bearing on this question. All of them, while recognizing the rights of abutting property owners in the street, have endeavored to safeguard the paramount rights of the public in any use of the street which was reasonable or proper at the time or could be fairly anticipated for the future. It is only within a comparatively recent time that the sub-surface of the streets has been used for any purpose by the public. Formerly the abutting property owners used only the sub-surface under the sidewalks for coal vaults or for storage purposes. The public first began to use the space under the streets for sewers and water and gas mains. In recent years the public has begun to use it for telegraph and telephone lines, though these latter are still often placed, under certain restrictions, on poles set in the ground. (*City of Springfield v. Postal Telegraph Cable Co.*, 253 Ill. 346.) This sub-surface of the streets recently has been taken for almost every sort of a public use. In addition to sewers, water mains and public utilities generally, we find this space used for public lavatories, public cisterns and other kindred public conveniences. It would be difficult, if not impossible, to anticipate with any reasonable certainty the future uses, either above or below the surface of the street, which may be required in the interests of the public. * * *

“Under the authorities in this as well as other jurisdictions, if the sub-surface of the street is needed by the public for travel or other public uses, the mere fact that such public use will deprive abutters of the use

of vaults and other similar underground structures in the street theretofore maintained, cannot stand in the way of the construction of sewers or subways. 'Abutters are bound to withdraw from the occupation of streets above or below the surface whenever the public needs the occupied space for travel.' *Sears v. Crocker*, *supra*; *Tacoma Safety Deposit Co. v. City of Chicago*, *supra*; *Fifty Associates v. City of Boston*, 88 N. E. Rep. (Mass.) 427. * * *

Reference will hereafter be made to the Massachusetts cases so cited and the doctrine which they lay down. It is of importance to note that our Supreme Court quotes from them with approval.

In the case of *Sears v. City of Chicago*, above mentioned, the court said:

“Whatever may be the rule in other jurisdictions, the law is settled in this State that a city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held. (*Nelson v. Godfrey*, 12 Ill. 20; *Gridley v. City of Bloomington*, 68 *id.* 47; *Chicago and Northwestern Railway Co. v. People*, 91 *id.* 251; *City of Quincy v. Bull*, 106 *id.* 337; *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 *id.* 42; *Gregsten v. City of Chicago*, 145 *id.* 451; *West Chicago Masonic Ass'n v. Cohn*, 192 *id.* 210; *Dillon on Mun. Corp.*, 541-551.) And it is equally well settled that the city may regulate such use and fix a reasonable compensation to be paid for the same. (*McCarthy v. City of Chicago*, 53 Ill. 38; *City of Chicago v. Norton Milling Co.*, 196 *id.* 580; *Lobdell v. City of Chicago*, 227 *id.* 218.) The power of the municipality in this regard in cases where it owns the fee in its streets is subject to no limitation except that its exercise shall be reasonable and in a manner to safeguard the paramount right of the public to the free and unobstructed use of the street for the purpose for which it was dedicated. In cases, however, where the municipality only has an easement in its streets and the fee remains in the abutting lot owners, the relative rights of the municipality and the abutting lot owners are to be determined under entirely different rules of law. * * *

The court obviously in making this last statement referred to the different rules applicable to the right of the City to charge compensation for the use of such sub-sidewalk space. In cases where the City owns the fee, it has the absolute right to charge such compensation, but where the abutting owns the fee and the City has the easement only, the City has no right to charge compensation for the use of such space.

The City, however, at any time when it has occasion to make use of such space for any proper street purpose, can require the abutting property owner to vacate the same at his own expense, and without the payment by the City of compensation, regardless of whether the City owns the fee of the street or has only an easement.

This appears from the language of the court in the *Sears* and other cases. The court in the *Sears* case said at page 217:

"The abutting lot owner thus being the owner of the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement which is held for the use of the public. (3 Kent's Com., 12th ed., 433; Hurley v. Chandler, 6 Mass. 454; Tucker v. Tower, 26 id. 108.) It is as unreasonable as it is illogical to say that the abutting lot owner who owns the fee in a street, subject only to the easement of the public, must pay the City for the privilege of using his own property in a manner that in no way interferes with or disturbs the full enjoyment of the easement."

The Massachusetts case of *Sears v. Crocker*, quoted with approval by our Supreme Court as above mentioned, was a suit brought by an abutting property owner to whom the fee of the street belonged. It was there held that the City had the right in constructing a transportation subway to deprive such abutting property owners "of the use of vaults or other similar underground structures in the streets, which they had heretofore maintained." The Massachusetts Supreme Court said, referring to its earlier decisions:

“* * * the doctrine was stated broadly in accordance with the previous decisions, that this *public easement includes ‘every kind of travel and communication for the movement or transportation of persons or property, which is reasonable and proper in the use of a public street.’*”

* * * * *

“‘They’ (the original owners of the lands in Boston) ‘did not think that the surface of the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. *It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used.* Our system, which leaves to the land owner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, *but the public rights in these lands are plainly paramount*, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equalled, if it has not surpassed, the increase of requirements for business along the streets.’”

In the later case of *Commonwealth v. Morrison*, 197 Mass. 199, the Supreme Court of Massachusetts said:

“‘The easement which the public acquires includes every reasonable means of transportation for persons, and commodities, and of transmission of intelligence which the advance of civilization may render suitable for a highway. Under this description of the character of the rights acquired by the public, gas and water pipes, sewers, telephone, telegraph, electric light and power poles, wires and conduits, electric and horse railways, the Boston subway and private railroads have been permitted.’” (Citing many cases.)

In *Fifty Associates v. City of Boston*, 201 Mass. 585 (also cited with approval by our Supreme Court in the *Field* case), the Supreme Court said, referring to the Boston subway:

“That the public easement in a street includes the use of the land below the surface as well as the use of the surface, and that a tunnel *is a street use* was established in *Sears v. Crocker*, 184 Mass. 586. (69 N. E. 327, 100 Am. St. Rep. 577.) It is also established that the legislature might have authorized the building of this tunnel *without making compensation* for bringing to an end the use which the petitioner as owner of the fee had theretofore made of the land under the street. See *Boston Electric Light Co. v. Boston Terminal Co.*, 184 Mass. 566. (69 N. E. 346.)”

In *Peabody et al., Trustees v. City of Boston*, 220 Mass. 376, it was held that:

“A city acquiring an easement for a street in land the fee of which remains in the abutting owners may construct a subway in the street without becoming liable to compensation to the abutting owners using the space under the sidewalk in connection with their buildings, and necessitating the removal of appurtenances, unless the statute provides for compensation.

“St. 1902, c. 534, authorizing the construction of subways in Boston, and empowering the transit commission to use for the purpose of the act public ways and lands without compensation, and award damages sustained by any person by reason of property taken or injured except public ways and lands, and to remove conduits or other property, does not give to an abutting owner compensation for the removal of appurtenances located under the sidewalk.”

This case is also reported in *Lawyers' Reports Annotated*, 1915 F at page 1005, where numerous cases are cited in support of the proposition that a subway constructed for street railway purposes is a proper street use.

The doctrine so emphatically laid down by the Massachusetts courts and approved by the Supreme Court of this

state is in accord with the decisions of the Illinois courts dealing directly with the construction of subways and tunnels.

In *Barsaloux v. City of Chicago*, 245 Ill. 598, the court said, at page 607:

“* * * If the public interest should require that all or a portion of the street railways of a city should be constructed beneath the surface of the streets, no valid reason is perceived why the power to meet such public necessity should be denied in respect to such subways that does not apply with equal force to surface and elevated street railways. Street railways, whether constructed above, below or on the surface of the streets, are intended to furnish the public with a convenient means of traveling from one part of a city to another. The primary use of streets is to accommodate travel in cities and towns, and since street railways afford the public increased facilities for street travel, the use of streets for this mode of travel does not impose any additional servitude on such highways. * * *”

“It is not at all improbable that in a great city like Chicago, in order to have a complete system of street railways, it will become necessary to construct street railways upon, above and below the surface of the streets.”

The *Barsaloux* case was heard in the lower court by Judge George A. Carpenter, and in the opinion delivered by him he said:

“The only test by which the City is governed in determining what use shall be made of the streets is, whether or not it is for the benefit of the public and to that end a legitimate use of the streets.”

“Whether the fee simple title of the street be in the City or in the State, or in the abutting property owner, is immaterial. There is vested in the trustee a title co-extensive with the trust.”

* * * * *

“No thinking man will say today that the building of a subway by the City of Chicago is not in the interest of the general public, and therefore a legitimate corporate purpose. If it is a legitimate corporate purpose,

it may be built beneath the surface of the streets within the corporate limits.”

In *City of Chicago v. Rumsey*, 87 Ill. 348, in which the power of the City to build the La Salle Street tunnel was sustained, the court said, at page 364:

“There is no principle upon which the right to locate a railroad upon a street, as a legitimate use of the street, can be sanctioned which will not also sanction the construction of a tunnel in a street. The tunnel does not change the character of the street or apply it to a new use. It imposes no new servitude, and is for the convenience of passage by the ordinary modes of travel in a street. * * *”

As appears from the above quotations from the *Barsaloux* case, our Supreme Court holds that the building of a subway for passenger transportation purposes is equivalent to the construction of a street railway, and does not impose an additional servitude upon the property of abutting owners to whom the fee of the street belongs. This is in accord with earlier decisions of our Supreme Court, holding that the construction of a street railway does not impose any additional servitude.

C., B. & Q. R. R. Co. v. Street R. R. Co., 156 Ill. 255.

Doane v. Lake Street Elevated Railroad Co., 165 Ill. 510.

Wilder v. Aurora, etc., Traction Co., 216 Ill. 493.

In the above mentioned *C., B. & Q.* case the Supreme Court said, at page 266:

“The weight of authority is in favor of the position, ‘that a street railway is not an additional servitude even where the fee of the street is in the abutting owner.’ (2 Dillon on Mun. Corp., 4th Ed., Sec. 723 (574), and cases cited in Note 3.) * * *

“The use of the street by such a street railroad company being within the purposes for which streets are laid out and maintained, the abutting owner can recover no compensation for the damages resulting from such use, whether the fee is in him or in the city, pro-

vided the right of ingress and egress and of passage and repassage is left reasonably free to him. (Lewis on Em. Dom., Sec. 124; Elliott on Roads and Streets, pages 528, 529, 558.) Streets are laid out in order that the public may enjoy the right of free passage in vehicles as well as on foot, and such vehicles may be carriages running on grooved tracks, or operated in the modes, or by the forces which an advanced civilization may require for the general convenience. (Pierce on Railroads, Sec. 234; Cooley on Cons. Lim., 6th Ed., page 683.) The laying of a street railway in the streets of a city, and the running of cars thereon for the transportation of passengers, must be regarded as among the uses contemplated when the street was laid out; hence, the owner of abutting land, even though he owns the fee of the street, can only recover damages for such special and material injury as may be shown to have resulted to his property from the construction and operation of such railway. (23 Am. & Eng. Enc. of Law, page 954.)”

In the above mentioned *Wilder* case the court said, at page 526:

“It has been held that a *street railway is not an additional servitude*, even where the fee of the street is in the abutting owner. * * *”

“If the road so to be constructed be regarded as merely a street railroad, it cannot be regarded as an additional servitude, and the appellant is not entitled to an injunction against its construction even though he is the owner of the abutting property and of the fee of the street in front thereof to the center of the same.
* * *”

This case recognizes the distinction drawn in other authorities between a street railway for the transportation of passengers on the one hand, and a commercial railroad for the transportation of merchandise and freight as well as passengers, and holds that while the former does not create any additional servitude, the latter does, and that the construction of such a commercial railroad entitles the abutting property owner to further compensation. Throughout this opinion it is assumed by us that the railway to be built in the

subway to be constructed by the City would be exclusively for the transportation of passengers and not for the transportation of merchandise or freight. If the latter were to be included it might give the abutting property owners right to additional compensation on the ground that the easement of the City to use the streets for all proper street purposes did not include the right to use it for such commercial railroad. The cases above cited show that there is no "taking" within the meaning of the Constitution of the property of the abutting owners when the municipality compels such owners to vacate sub-sidewalk space in order that a passenger subway may be constructed. Therefore, the abutting property owners under such circumstances sustain no damage for which there can be any recovery at law.

We do not discuss here the matter of consequential damages, if any, to property outside the street lines by reason of the construction of the subways. Such consequential damages are controlled by altogether different principles of law. (See *Barnard et al. v. City of Chicago*, 270 Ill. 27; *Peck v. Chicago Railways Co.*, 270 Ill. 34; *McDonnell v. Lake Erie & W.*, 208 Ill. App. 442; *Nixon v. Chicago*, 212 Ill. App. 365; *Bruno v. Chicago*, 214 Ill. App. 498; *Malina v. Oplatka*, 223 Ill. App. 236.)

The ordinances of the City recognize the right of the City to compel abutting property owners to vacate, and define the procedure to be followed. (See Art. IV, Chap. LXXII, The Chicago Municipal Code of 1922, which is a re-enactment of the provisions of the Municipal Code of Chicago of 1911, as amended.)"

Respectfully submitted,

STEPHEN A. FOSTER,
JEROME N. FRANK,
WM. H. SEXTON,

*Special Assistant Corporation Counsel
Assigned to the Committee on Local
Transportation.*

**Right of City to Require Privately Owned Utility
Companies to Remove, Temporarily Maintain
and Relocate Their Property If
City Builds Subway.**

January 19, 1923.

MR. R. F. KELKER, JR., Chief Engineer of Committee on
Local Transportation of the City Council of the City
of Chicago.

Dear Sir:

In your letter of January 15, 1923, you asked for our opinion on: "The right of the City to require privately owned utility companies to remove, temporarily maintain, and relocate their property, without expense to the City, should the City build subways to be used in whole or in part for street railway purposes."

In reply we would say that our opinion is that the City has such right.

In a separate letter of this date, in reply to your inquiry as to the rights of abutting property owners, we have already advised you that in our opinion such owners, even where they own the fee to the center of the street, can be required to vacate, at their own expense, any sub-surface space occupied by them whenever the City finds it necessary to use such space for the construction of subways, and that the City will not be required to pay such owners compensation for so doing. If, as we there conclude, these abutting property owners who have the legal title to the streets, when the City elects to exercise the paramount public right of travel, can be compelled to vacate this space at their own expense, it would seem clear that public utility companies who have no title to the street or any right therein except as licensees of the City or State can be required to vacate at their own expense and without receiving any compensation from the City for so doing. (See cases cited in our opinion No. 2

of this date, especially *People v. Marshall Field & Co.*, 266 Ill. 609.)

The right of the municipality, in the exercise of the police power, to require public utility companies to conform to new conditions has been sustained repeatedly by the courts. The fundamental principle upon which these cases rest is stated as follows in 13 R. C. L. (page 87) :

“Public service corporations occupying a street under a franchise are held to have acquired their rights on the condition, implied where not expressed, that the city reserves the full and unconditional power to make any reasonable change of grade or other improvement in its streets. Hence, in the absence of negligence or wantonness on the part of the city, such a corporation cannot maintain an action for damages occasioned by the necessity of taking up and relaying its pipes, tracks, or other appliances, in order to accommodate them to the new grade. So the power of the municipality to change the grade of its streets whenever and as often as the public needs and convenience require, is not affected by the fact that a street is occupied by a railroad company under a franchise.”

In 6 L. R. A. (N. S.), page 1026, many authorities are cited in support of the following proposition :

“A review of the authorities shows that they are in harmony in holding that a municipality cannot contract away its power to control and regulate its streets, and that it is not liable to companies or individuals having franchises in the highway for expenses incurred by them in readjusting their appliances to meet conditions created by the municipality in making public improvements, where such improvements are made in a reasonable manner, and not so carried on as to cause unnecessary injury; and that the acts of the municipality in causing such expenses do not infringe the constitutional provisions against the taking of property without compensation, the impairment of contracts, or constitute a denial of due process of law.”

In L. R. A. 1917 D (page 663) it is stated :

“The general rule is that a change” (by a public utility company) “may be required where the public

convenience or safety requires it because of changing conditions or necessitated public improvements, but that an arbitrary or unreasonable change cannot be sanctioned by or enforced in the courts.

“Thus, it has been held that a public service corporation maintaining poles in a public street or highway under a franchise may be required at its own expense to change their location, where the present location interferes with a contemplated improvement of such public way, and the order is not unreasonable and is devoid of fraud and corruption.”

In the recent case of *Erie R. R. Co. v. Public Utility Commissioners*, 254 U. S. 394, the Supreme Court of the United States reviewed earlier authorities and passed upon the right of a state to change the grade of streets, and to require a variety of public utilities, including a steam railroad, a street railroad, a water company, and a telegraph company to adjust their respective facilities at their own expense. In that case the Board of Public Utility Commissioners of New Jersey had directed a change in grade in fifteen places in the City of Patterson where the Erie Railroad crossed a number of streets at grade, and the carrying out of this order necessitated a readjustment of the facilities not only of the railroad company, but also of a street railway company, a water company and the Western Union Telegraph Company. The commission's order directed how the expense of this work should be divided between the several public utilities involved and made no provision for the state or city bearing any portion thereof. The Supreme Court of the United States affirmed the judgment of the highest court of the State of New Jersey, sustaining the order of the Board of Public Utility Commissioners. Mr. Justice Holmes in delivering the opinion of the court said (page 409) :

“Most of the streets concerned were laid out later than the railroads and this fact is relied upon, so far as it goes, as an additional reason for denying the power of the State *to throw the burden of this improvement upon the railroad*. That is the fundamental question in the case. It might seem to be answered by the summary

of the decision given in *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis*, 232 U. S. 430, 438. "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks or to carry their tracks over such highways." *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121; *Northern Pacific Ry. Co. v. Puget Sound & Willapa Harbor Ry. Co.*, 250 U. S. 332. * * *

"Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the State, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power. * * *

"While the Railroad Company contends that the Public Service Railway Company should be charged more, the latter company comes here upon the proposition that it should be charged nothing. We agree with the courts below that a street railway crossing the tracks of a steam road at grade in a public street increases the danger and may be required to bear a part of the expense of removing it. The amount charged does not appear to be excessive, and upon the principles that we have laid down the payment of it may be made a condition of the continued right to use the streets. *Detroit, Fort Wayne & Belle Isle Ry. v. Osborn*, 189 U. S. 383, 390; *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121, 129."

"The Passaic Water Company contends that the expense of moving its pipes cannot be thrown wholly upon it—mainly on the ground that the change of grade was unlawful. This ground fails and the company must

adjust itself to the lawfully changed conditions. It also contends that it does not receive the equal protection of the laws because the street railway instead of being charged the expense of moving its tracks is charged ten per centum of the total expense at its crossings. Presumably this charge is greater than the mere adjustment of tracks to a new surface. It is based upon the share of the street railroad in creating the danger. As the street railroad cannot complain, certainly the Water Company cannot. * * *"

It is well established that in laying out or changing the grades of highways a municipality is exercising the police power.

Jones v. Brim, 165 U. S. 180.

Wisconsin, etc., R'd Co. v. Jacobson, 179 U. S. 287.

Olcott v. The Supervisors, 16 Wall. 678, 696.

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 661.

Lake Shore & Michigan So. Ry. Co. v. Ohio, 173 U. S. 284, 303.

In the above mentioned case of *Jones v. Brim* the court, in holding constitutional a statute covering the regulation of a public highway, said (page 182):

"* * * Embraced within the police powers of a State is the establishment, maintenance and control of public highways. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661. The legislation in question would clearly seem, therefore, to come within the narrowest definition of the police power. * * *"

In *Olcott v. Supervisors*, above referred to, the court said (page 696):

"* * * If there be any purpose for which taxation would seem to be legitimate it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. * * *"

There is no distinction in principle between the laying out of an ordinary street and the construction of a subway for street purposes.

In *Sears v. Crocker*, 184 Mass. 586, the court said in speaking of the Boston subway:

“The new method is the substitution in part of a subterranean use of the streets for the use of their surface for the same general purposes.”

The same rule applies to any public utility property whether it is on or below the surface of the street.

In *New Orleans Gas Light Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, the court sustained the right of the City to require the Gas Company at its own expense to relocate its pipes to permit the construction of the City's drainage system. The court said (page 461):

“This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as it relates to the right to regulate the use of the surface of the streets, and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power. We see no reason why the same principle should not apply to the sub-surface of the streets, which, no less than the surface, is primarily under public control. The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage, and every reason of public policy requires that grants of rights in such sub-surface shall be held subject to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. *National Water Works Co. v. City of Kansas*, 28 Fed. Rep. 921, in which the opinion was delivered by Mr. Justice Brewer, then Circuit

Judge; *Gas Light & Coke Co. v. Columbus*, 50 Ohio St. 65; *Jamaica Pond Aqueduct Co. v. Brookline*, 121 Massachusetts, 5; *In re Deering*, 93 N. Y. 361; *C., B. & Q. R. R. v. Chicago*, 166 U. S. 226, 254. In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

There are a large number of cases which have applied the principles above set forth. From among them, we have selected the following as being fairly illustrative of the rule established by the decisions of our Supreme Court and the Supreme Court of the United States.

C. & N. W. Ry. Co. v. City of Chicago, 140 Ill. 309.

C. B. & Q. Ry. v. People of the State of Illinois ex rel. Drainage Commissioners, 200 U. S. 561.

West Chicago Street R. R. Co. v. People of the State of Illinois ex rel. City of Chicago, 201 U. S. 506.

Chicago, Milwaukee & St. Paul Ry. Co. v. City of Minneapolis, 232 U. S. 430.

In the above mentioned case of *C. & N. W. Ry. Co. v. City of Chicago*, provisions of the statutes requiring railroad companies to fence their rights of way and to maintain street crossings and approaches at their own expense were sustained. The court said (page 317):

"Government owes to its citizens the duty of providing and preserving safe and convenient highways.

From this duty results the right of public control over public highways. * * *

And at page 318:

"The items of expense, for which appellant claims compensation, are such only as are involved in its compliance with a police regulation of the statute. It is well settled that 'neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare.' (*C. & A. R. R. Co. v. J. L. & A. R. R. Co.*, 105 Ill. 388.)"

In *C. B. & Q. Ry. v. People*, above cited, the Supreme Court of the United States affirmed a decision of the Supreme Court of this state sustaining the validity of an order of the Drainage Commissioners, ordering the railroad company to remove the bridge and culvert maintained by it over a creek and requiring the railroad company, if it continued to maintain a bridge at that point, to substitute a new one which would meet with the requirements of a certain plan of drainage adopted by the Commissioners. After reviewing the earlier decisions the court said (page 584):

"* * * in each of those cases, this court recognized the principle that injury may often come to private property as the result of legitimate *governmental action, reasonably taken for the public good and for no other purpose*, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. To this class belongs the recent, and as we think, decisive case of *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, to be hereafter adverted to in another connection.

"* * * We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. *Lake Shore & Mich. South. Ry. Co. v. Ohio*, 173 U. S. 285, 292; *Gilman v. Philadel-*

phia, 3 Wall. 713, 729; *Pound v. Turk*, 95 U. S. 459, 464; *Railroad Co. v. Husen*, 95 U. S. 470. * * *

In *West Chicago Street Railroad Co. v. People*, above cited, the right of the City of Chicago to require the West Chicago Street Railroad Company to lower at its own expense the Van Buren Street tunnel was sustained. The decision of the Supreme Court of this state was affirmed by the Supreme Court of the United States, which court said (page 520):

“Great stress is placed by the railroad company on the fact that it is the owner in fee of the bed of the river at the point where the tunnel was constructed. But that fact is not vital in the present discussion; for it was adjudged by the state court—in harmony with settled doctrines, as will presently appear—that ‘the title to land under a navigable river is not the same as the title to the shore land’; that ‘in a navigable stream the public right is paramount, and the owner of the soil under the bed of such a stream can only use and enjoy it in so far as is consistent with the public right, which must be free and unobstructed’; that ‘the title to the upland is absolute and paramount, while the title to the lands over which the navigable water flows is subordinate to the public right of navigation’; and that ‘the city could not, if it would, grant the right to obstruct the navigation of the river, or bind itself to permit anything which has become an obstruction to be continued.’ 214 Illinois, 9, 20, 21.”

The analogy between the paramount right of the City in the river and the paramount right of the City in the streets is made clear by the above language of the court. In each case the municipality has the authority to require the removal of any obstructions that may interfere with the paramount public right of travel.

It was further held in that case that the fact that the existing tunnel had been constructed with the consent of the City and when constructed did not interfere with navigation by vessels then engaged in commerce on the river did not prevent the City from requiring the company at its own

expense to lower the tunnel as required by changed conditions and the increased size of vessels.

In the case of *Chicago, Milwaukee & St. Paul Ry. v. Minneapolis*, above mentioned, the Supreme Court of the United States sustained a judgment condemning a portion of the right of way of a railroad company, and compelling that company to build at its own expense a bridge over the part so taken so as to permit a park district to construct a canal connecting two lakes within the limits of the park. The court said (page 441):

“If there is a distinction in the present case, it must lie in the fact that the crossing is an artificial waterway instead of a road. But it is none the less a public highway, established to afford an appropriate place of public passage. Walks are provided for those who go afoot, and it does not concern the plaintiff in error that others go in boats instead of vehicles. ‘The way sought to be established,’ said the Supreme Court of Minnesota, p. 465, ‘a canal or waterway, with walks along each side’ was ‘clearly a public way, subject to the rules governing public ways.’ It cannot make a difference in the constitutional rights of the Railway Company that this way was not constructed entirely, or chiefly, of solid earth; it is the fact, and not the mode, of public passage that is controlling. The case must be regarded as being one of a public crossing provided by law; and the authorities we have cited lead to the conclusion that the State, without infringing the guaranties of the Federal Constitution, could require the Railway Company to make suitable provision for carrying its tracks over the crossing without compensation.”

From the above authorities it appears that the same fundamental principle is applied not only to cases where a municipality is constructing an ordinary highway but also where it is improving navigable waters or constructing artificial waterways.

Obviously the same principle would apply in the construction in the street of a subway to be used in whole or in part for street railway purposes. As pointed out in our

former letter of this date, dealing with the rights of abutting property owners, the construction of a subway has been held by our Supreme Court in the *Barsaloux* case (245 Ill. 598) to be equivalent to the construction of a street railway and therefore to be a proper street purpose.

That portion of the police power of the state over streets, and above discussed, has been delegated to the various municipalities of the state. (See Paragraphs 7, 9, 10, 13, 28 and 66, Section 1, Article V of an act entitled, "An Act to provide for the incorporation of cities and villages, in force July 1, 1872, as amended.")

Special provisions are made with reference to the relocation of the facilities of the telephone and telegraph companies. (Sections 1, 4 and 19 of Chapter 134 of Hurd's Revised Statutes.)

We have made an examination of many of the ordinances granting the right to different public utility companies to place their facilities in the streets of the city, and find that in nearly all cases express provision is made for the protection of the City's right to require the removal or relocation of such facilities. In the ordinances passed during the last fifteen years, express mention has been made of the proposed construction of subways and the power has been expressly reserved to the City to require the relocation of public utility facilities.

In conclusion, we are of the opinion that in the construction of a subway of the character contemplated, all public utility companies could be required by the City to relocate their facilities at their own expense.

Respectfully submitted,

STEPHEN A. FOSTER,
JEROME N. FRANK,
WM. H. SEXTON,

*Special Assistant Corporation Counsel
Assigned to the Committee on Local
Transportation.*

**Payment of Bills for Engineering Services and Printing
in Connection With the South Water Street
Improvement—Effect of Failure to
Submit Same for Bids.**

April 16, 1923.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your letter of inquiry concerning bill of J. H. Prior for \$875.00 and bill of Carlstrand-Becker Co. for \$2334.40, both of which were incurred by the President of the Board of Local Improvements in connection with the work of large street improvements now under way, and vouchered against the bond funds covering these various improvements.

The appropriations against which these vouchers are drawn are "for contingent and other expenses not otherwise provided for, to be expended under the direction of the President of the Board of Local Improvements." This appropriation is so worded that it is entirely within the discretion of the President of the Board of Local Improvements to draw on it for the purposes mentioned in the bills which, in the case of Mr. Prior, are engineering services in connection with the said improvements and in the case of Carlstrand-Becker Co. consists of printing for the same general purposes.

So far as the Prior bill is concerned there could be no objection to paying the voucher because his services are of a character for which it is impracticable to advertise and take bids. In the case of the printers it would seem as though estimates were taken since the bill itself is written out "per estimate." While, therefore, the amount in the printing bill exceeds the \$500.00 limitation and under ordi-

nary circumstances would have required bids, we must assume either that such bids were secured or that the time within which the work had to be gotten out was insufficient to permit the formality of advertising. Since the President of the Board of Local Improvements has taken the responsibility of approving said bill and the work was delivered there does not seem to be any other course to pursue but to pay it under the authority of the case of *City of Chicago v. McGovern*, 281 Ill. 264.

We therefore recommend that said vouchers should be approved and paid. We return same herewith.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Payment of Services of Real Estate Expert Employed
by the Board of Local Improvements.**

April 16, 1923.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of your communication of April 16th, forwarding to us the voucher of C. M. Nichols for \$1,350, in payment of services rendered to the City of Chicago as a real estate expert by the said Nichols during the month of March, 1923, and calling our attention to an order of the City Council of February 21, 1923, appearing on page 1860 of the Journal of the Proceedings of the City Council of said date, in which order the City Council provided that on

and after March 1, 1923, the provisions of the appropriation ordinance would control the number of real estate experts employed by the Board of Local Improvements unless authority was given by the City Council for the employment of such experts previous to the incurrence of the liabilities.

In reply, we beg leave to advise you that the City Council provided in the annual appropriation bill passed March 31, 1923, and appearing on page 2303 of the Journal of the Proceedings of the City Council of said date, that the Board of Local Improvements should employ two real estate experts at \$100 per day, one at \$75 per day, and six at \$50 per day.

We are advised that this number of real estate experts has not been exceeded by the Board of Local Improvements, and we desire to call your attention to the fact that under Account 450-B-40 the City Council has appropriated \$50,000 for the payment of real estate experts employed by the Board of Local Improvements, and that such appropriation has been made from the South Water Street Improvement fund.

It is, therefore, our opinion that the Board of Local Improvements have the lawful authority to employ the said C. M. Nichols as a real estate expert at the rate of \$50 per day, and that his claim for pay for 27 days' service at \$50 a day, amounting to \$1,350.00 should be approved and passed by you for payment.

We return herewith your enclosures.

Yours very truly,

JAMES W. BREEN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Proceeding to Build Bridge at South Crawford Avenue
and the Drainage Canal—Jurisdiction of the
City of Chicago and the Sanitary District.**

April 16, 1923.

HON. JOSEPH O. KOSTNER, Alderman of the 23d Ward.

Dear Sir:

In reply to your request for an opinion as to whether there are any legal steps to be taken in the matter of the construction of a bridge at South Crawford Avenue and the Drainage Canal, we respectfully submit the following:

The duty of building such a bridge is by law placed upon the Sanitary District of Chicago.

Sec. 12, Sanitary District Act.

Sec. 2, Supplementary Act of 1901.

In the case of *Sanitary District of Chicago v. C. & A. R. R. Co.*, 267 Ill. 252, our Supreme Court, in discussing the two sections above cited, said:

“Manifestly, from these sections, read in connection with the remaining portions of these acts, the legislature intended that this municipality should be required to build bridges across the main channel and its adjuncts.”

Since the Sanitary District is, however, a separate and distinct municipal corporation from the City of Chicago, the latter municipality has no control over the actions of the former in that regard. Moreover, while it is the general duty of the Sanitary District to build such bridges, the precise type of bridges and the precise time when the same are to be built, are matters resting within the discretion of the governing body of said last mentioned municipality.

Were it merely a question of repairing a bridge already existing, and it could be shown that the Sanitary District

had sufficient funds for that purpose, its trustees might perhaps be compelled by *mandamus* proceedings, instituted by some interested citizen or taxpayer, to repair such bridge, but the building of a new bridge (which, as we understand, is what is involved in this case) demands the exercise of a greater degree of discretion.

Comrs. of Highways v. People, 19 Ill. App. 253.

County of St. Clair v. People, 85 Ill. 396.

People v. Comrs. of Highways, 118 Ill. 239.

In the case of *County of St. Clair v. People*, 85 Ill. 396, our Supreme Court said:

“But it is said, that all power and control over public roads is given to the board of commissioners by the 179th section of the Road Law; that this clearly makes it the duty of the board to construct bridges.

“Being their duty they should perform it, and failing to do so, they should be compelled to its performance by *mandamus*. It is not every general duty imposed on a public officer than can be enforced by *mandamus*. The General Assembly is under a solemn duty to pass all needed laws, and to repeal those that are oppressive or operate injuriously upon the people, yet no one, so far as our researches extend, has ever supposed such a body could be coerced to the performance of the duty, nor can the Governor of the State be so compelled to discharge his executive duties. All know that it is the duty of cities and other municipal corporations to enact and enforce wholesome ordinances for the preservation of order within their limits, yet we have found no case where, on their neglect or refusal to do so, they have been compelled by *mandamus*. Hence, the legal proposition is stated too broadly when it is said, that when a public officer or body refuses to perform a duty they will be compelled by *mandamus*.

“Where a duty is imposed to perform a specific act, and there remains no discretion to be exercised, the writ will generally lie against an officer to compel its performance. So of officers associated for the performance of public duties. But where the duty is not specific but general, depending on judgment and discretion, the writ does not lie to compel the performance of the duty, and

clearly not in a specific manner. Where the law imposing the duty upon a municipal corporation makes the performance thereof discretionary by its authorities, a writ of *mandamus* to compel its performance will not lie, but if there is no discretion it is otherwise. See *School Inspectors v. Grove*, 20 Ill. 526; *The People v. Hilliard*, 29 *ib.* 413; *The People v. Gilmer*, 5 Gilm. 242; *City of Ottawa v. The People*, 48 Ill. 233. * * *

"The board has the discretion to build such bridges when they deem the public interest to require them, and the funds of the country will justify the improvement. But of these facts they are the judges, and it is beyond the power of the courts or of other persons to determine that question for them. It is believed no case can be found, where such a power has been conferred, that a court has undertaken to control its exercise by determining and requiring the municipality shall exercise it in any specific mode."

For the reasons above stated we are of the opinion that the duty of building the bridge in question rests upon the Sanitary District of Chicago, whose trustees are clothed with a certain amount of discretion as to the time when, and the manner in which, it is to be built; and that while the speedy and expeditious undertaking of such enterprise may be requested of, and urged upon, them by representatives of the public, as well as by interested individuals, said trustees can not be coerced by any judicial process to commence the undertaking.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Right to Build Fire Station on Stub End of Lake Street
—Encroachments on the Streets—
Vacation of Streets.**

April 18, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In reply to your request for an opinion from the Corporation Counsel, relative to the legal feasibility of using the stub end of Lake street, east of Michigan avenue (or, in lieu thereof, a strip off the south side of Randolph street, just east of Michigan avenue) for the erection of a fire engine station, we respectfully submit the following:

Under date of May 23, 1922, this department rendered an opinion, prepared by Assistant Corporation Counsel Leon Hornstein, relating to the use of a portion of the same stub end of Lake street for a First Ward Office and Yard, and the opinion was there expressed that, in view of the fact that said street stub end is cut off from the upper level of Michigan avenue as well as from the rest of Lake street, and merely serves as a short connecting link between Beaubien court and the lower level of Michigan avenue, and since there is no likelihood that it will ever be used to any great extent by the public, the use of a part of it for a ward office and yard would not seriously interfere with its usefulness as a street.

The use now proposed to be made of said street stub end, goes one step further, in that it contemplates the erection of a building of more permanent character as well as of greater height, but since it does not occupy substantially any greater space on the street than the one referred to in our former opinion, we feel that our answer should be the same so far as Lake street is concerned.

We find from the records in the City Map Department that Lake street, at that point is 80.75 feet in width and only

69.4 feet in length, and that Beaubien court with which it connects on the east, is only 50 feet in width.

It cannot be denied that either a ward office or a fire station, located in a public street, would constitute a *technical* obstruction of the street. But the courts have held that they will not interfere with any mere technical obstructions of a street authorized by the municipal authorities, unless the usefulness of the street to the public for street purposes is impaired, or some special injury is done to individuals.

Thus, in the case of *McDonald v. English*, 85 Ill. 232, the City Council of the City of Danville had authorized the First National Bank of that city to construct stone steps in front of its bank, extending several feet into the street. An adjoining property owner brought suit against the bank for maintaining a nuisance, but the Supreme Court, in sustaining a judgment for the defendant, said:

“Many things may be authorized by legislative or proper municipal authority, which, if not thus authorized, would be deemed nuisances, but being authorized, so far as regards the public, they are lawful; and yet they may to a greater or less extent, interfere with the free and entire use of the street. Dillon on Mun. Corp., Sec. 538, *et seq.* * * *

“We agree with the counsel for the appellant, that municipal authority cannot authorize that which is deemed a legal injury to the property of the individual, without making compensation, but we cannot yield our assent to his position, that the individual can recover for every *technical nuisance* to the streets of a city, without regard to whether he has sustained special injury thereby.”

In the present case, the plans accompanying your letter show that Lake street at the place in question is 80.75 feet in width; that it is proposed to use a 36-foot wide strip in the center of the street for the proposed fire station, leaving a roadway on either side 22.35 feet in width, or as an alternative plan, build the fire station on a level with the upper level of Michigan avenue on pillars, similar to those supporting the upper level of said last mentioned street, leav-

ing the entire present roadway of the stub end of Lake street free for transportation purposes, without any other obstructions than the said pillars.

As the last mentioned plan presents the least legal objections, we shall consider the same first. It amounts in effect to building the structure in question, not on the street, but above the same, placing however certain supporting pillars on the street itself.

Such pillars would no doubt constitute a technical encroachment upon the street, but if authorized by the City Council, which represents the public in that regard, the City could not afterwards complain of the same; and so far as abutting property owners are concerned, there would be little ground for complaint, considering that the street, which is not a through street in any sense, and has no prospect of ever becoming an important traffic street, is at present far wider than can be reasonably necessary for the amount of traffic that can reasonably make use of the same (being, as we have seen 11 feet wider than it is long and 30 feet wider than Beaubien court). We are therefore of the opinion that this question of a technical encroachment would not be regarded by the courts as a serious objection, in view of the greater public benefits that could be obtained by a relaxation of a technical rule under such circumstances as those here considered.

“As to an obstruction in a public street, if it does not practically affect the use or enjoyment of the neighboring property, and thereby impair its value, no action will lie.”

Barrow v. City of Sycamore, 150 Ill. 588.

So much for the pillars in the street. As regards the building proposed to be built upon the same, there is, of course, the possibility that the abutting property owners would claim that it would obstruct the light of their buildings to a certain extent, and thereby damage the value of the same, as was alleged in the case of *Barrow v. City of Sycamore*, *supra*. Considering, however, that it is proposed to

build it in the center of the street, leaving a considerable open space on either side, and considering that the building is to be of a rather limited height, and further considering that such a building, if built according to the ornamental design shown by the sketch you submitted to us, would be an improvement to the street, and accordingly tend to increase rather than diminish the value of neighboring property, we do not believe that there would be a great deal of merit in such a claim by the property owners. Even if they could show nominal damages, that would not be sufficient to warrant any court in interfering by injunction. But to avoid any trouble or annoyance in that regard, it would of course be well to endeavor to secure the consent of the adjoining property owners beforehand. However, it should be borne in mind that the right of an abutting property owner in the street in front of his premises is merely the right of *access* to his property, and the easement of light and air. Further than that, he has no greater right in the street than has the general public.

Illinois Malleable Iron Co. v. Comrs. of Lincoln Park, 263 Ill. 446.

While the primary use of a street is for purposes of public travel, yet that is not the *only* public use to which a street may be put. Especially is this true of space above or below the surface. In the case of *People v. Marshall Field & Co.*, 266 Ill. 609, 624, our Supreme Court, in discussing more especially space under streets, said:

“It is only within a comparatively recent time that the sub-surface of the streets have been used for any purpose by the public. Formerly the abutting property owners used only the sub-surface under the sidewalks for coal vaults or for storage purposes. The public first began to use the space under the streets for sewers and water and gas mains. In recent years the public has begun to use it for telegraph and telephone lines, though these latter are still often placed, under certain restrictions, on poles set in the ground. (*City of Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346.) This sub-surface of the streets recently has been taken for *almost every sort of public use*. In addition to sewers, water

mains and public utilities generally, we find this space used for public lavatories, public cisterns and other kindred public conveniences. *It would be difficult, if not impossible to anticipate with any reasonable certainty, the future uses, either above or below the surface of the street, which may be required in the interests of the public.*"

So the building of a fire station in space above the surface of a street, would no doubt be putting such space to a new use which it has not heretofore been customary to utilize it for. But that would not necessarily make it illegal; for as our Supreme Court says, new public uses are constantly being made of such space, and we believe that this one might be classed among the "future uses" referred to by the court in *People v. Field*, *supra*. Not that this would, perhaps, be a proper use for every street. But the situation in regard to this street is very different from that of the average street. Ordinarily, such a structure built over a street, on pillars, would interfere with the use of the street for public travel and also, possibly, be a detriment to neighboring property. But those seem to be the only grounds upon which such structures have been held unlawful. It would seem to follow that if, because of the peculiar location, size and condition of a street, a structure over the same would have no such effect, it would not be unlawful.

In *Sears v. City of Chicago*, 247 Ill. 204, 216, the court said:

"Whatever may be the rule in other jurisdictions, the law is settled in this state that a city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public use for which they are held. (*Nelson v. Godfrey*, 12 Ill. 20; *Gridley v. City of Bloomington*, 68 id. 47; *Chicago and Northwestern Railway Co. v. People*, 91 id. 257; *City of Quincy v. Bull*, 106 id. 337; *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 id. 42; *Gregsten v. City of Chicago*, 145 id. 451; *West Chicago Masonic Ass'n v. Cohn*, 192 id. 210; *Dillon on Mun. Corp.* 541-551.)"

In *City of Springfield v. Postal Telegraph Co.*, 253 Ill. 346, the court said (p. 353) :

“The law has long been settled in this state that any city, which has the fee, under the power to control its streets granted by the Cities and Villages Act, may allow any use of them that is not inconsistent with public objects for which they are held.”

In that case the court pointed out that it was a perfectly proper use of a street to permit telegraph poles to be placed on the same, that being a necessary public purpose, and it might well be asked if fire engine stations are not equally necessary to the public, and whether, assuming of course that they can be built so as to in nowise interfere with the usefulness of the street for purposes of public travel, they cannot under some circumstances be built in a public street.

And in *City of Mt. Carmel v. Shaw*, 155 Ill. 37, it was held that a municipal corporation, organized under the Cities and Villages Act,

“may do anything with its streets which is not incompatible with the end for which streets are established. (*Roberts v. City of Chicago*, 26 Ill. 249; *Murphy v. City of Chicago*, 29 *id.* 279.)”

Moreover, this would not be the first street in the City of Chicago over which an overhead structure has been built, for some years ago the City Council permitted Marshall Field & Co. to build a structure over Holden court (and other similar permits have since been given). The Supreme Court held that such structures could not lawfully be built if they would cause irreparable injury to abutting property owners (*Field v. Barling*, 149 Ill. 556), but on no other grounds were such structures held illegal; and structures subsequently built with the consent of adjoining property owners have not been disturbed. Whether Holden court is to be considered a street or an alley is immaterial, for our Supreme Court has held that there is no distinction in law between a street and an alley. In *Burton v. City of Chicago*, 236 Ill. 383, the court said :

“The power and jurisdiction of the City over the public alleys of the City are identical with its power and jurisdiction over the streets of the City. *In this state there is no distinction, in law, between a public street and a public alley.* The only popular distinction between them is the difference in width, and that distinction is as indefinite as the difference between a narrow-tired wheel and a broad-tired wheel. There is no certain width on one side of which a public highway is a street while on the other side it is an alley. Nor can it be said that a public way having a sidewalk on one or both sides is a street, while another public highway, identical in every other respect but without a sidewalk, is an alley.”

That the structure over Holden court, for instance, is for a private purpose, while the proposed structure over Lake street is intended for a public purpose, is a point in favor of, rather than against, the latter.

We might consider, also, the question whether the building of such a structure over the street, upon pillars resting on the surface of the same, would constitute such a diversion of the use of the street from that for which it was dedicated, as to cause the title thereof to revert. That a street or other dedicated public property will revert to the dedicator, his heirs or assigns, if used for a totally different purpose than that for which it was dedicated is well settled.

Village of Riverside v. McLain, 210 Ill. 308.

The portion of Lake street in question is located in Fort Dearborn Addition to Chicago. In 1837 a revocable permit was issued by the Secretary of War for the opening up of Lake street from State street to the lake, and later, in the same year, Fort Dearborn Addition was laid out, under order of the United States Government, whereby Lake street and other streets were opened up.

City of Chicago v. Ill. Cent. R. Co., 33 Fed. 730.

This plat has been held to be a statutory plat, vesting the fee of the streets in the City of Chicago.

Williams v. City of Chicago, 247 Ill. 240.

Ill. Cent. R. Co. v. Illinois, 146 U. S. 387.

U. S. v. Ill. Cent. R. Co., 154 U. S. 225.

The reversionary interest, or, more correctly, the "possibility of reverter," in the street is therefore held by the United States Government.

But, as we stated in the former opinion, above referred to, the United States Government has permitted so much encroachment on the street heretofore (particularly east of Beaubien court), without claiming any right of reversion by reason thereof, that it must be considered to have waived the right to now claim any such reversion for any mere encroachments that do not amount to an actual abandonment of the street for street purposes; and clearly, mere pillars in the street would not have that effect.

The next plan proposed—that of building a two-story structure, with the first story resting on the present street level of Lake street, and the second on a level with the upper level of Michigan avenue—would go one step further in the matter of street obstruction, and would accordingly be just that much more doubtful as to legality, although we are not prepared to say that even that could not be done, considering that the street now has a far greater width at that point than would be necessary to meet the demands of present and future traffic. Considering that the abutting property owners would thereby be relieved from expensive special assessments for the pavement of such portion of the street, they would perhaps have little cause to complain, and the City would be estopped from objecting after the City Council had authorized the undertaking; and it would be difficult to find any other party with any sufficient interest in the matter to authorize him to complain.

As a general rule, it must be admitted, however, that it is not permissible to erect buildings or other large permanent structures in public highways, that being, generally speaking, a use inconsistent with their use as highways.

City of Morrison v. Hinkson, 87 Ill. 587.

Barrows v. City of Sycamore, 150 Ill. 588.

Hibbard v. Chicago, 175 Ill. 91.

People v. Harris, 203 Ill. 272.

Van Cleef v. City of Chicago, 240 Ill. 318.

Dillon on Mun. Corp. (5th Ed.), Sec. 1175.

But in all the cases holding that, the structure had been erected upon space actually needed for public travel. In none of them did we have such a peculiar situation as this, where the width of the street is more than 10 feet greater than the length thereof and clearly much greater than is reasonably necessary for the legitimate demands of present or prospective traffic thereon. Even in some of the cases last referred to the Supreme Court frowned upon any attempt to take advantage of "technical obstructions" which did not in fact hurt anybody.

But assuming that such a structure, built solidly on the surface of the street, would constitute such a serious obstruction of the same that it must be held unlawful, there is still a way in which the City could acquire the right to do it, provided it could first obtain the consent of Congress, and that would be by a vacation of the street.

Ordinarily, upon the vacation of a street, the title thereto will vest in the abutting property owners. This is true both as to streets dedicated according to the common law and streets dedicated by a statutory plat, executed after the date of the Statute of 1865 relative to the vacation of plats.

Prall v. Burckhardt, 299 Ill. 19.

Fort Dearborn Addition, however, was, as we have seen, laid out according to a statutory plat, executed long before the Statute of 1865 was enacted. Upon the vacation of any street therein, the title thereto would therefore revert to the original dedicator, which was the Government of the United States. However, Congress would of course have the power if it were so disposed, to waive the reversionary rights of the United States, and pass an act giving the City of Chicago permission to vacate any part of this street and still retain such vacated part for any other public use.

The third contemplated plan, that of using a strip off the south side of Randolph street just east of Michigan avenue for the construction of such fire station, would, in our opinion, constitute just a little more of a street obstruction than either of the other two plans, for it should be borne in mind that Randolph street is a through street running down to the lake, with a large present, and a still greater prospective, traffic. However, that portion of Randolph street is also in Fort Dearborn Addition to Chicago, and if Congress should authorize the City, in case of a vacation of a portion of such street, to retain such vacated part for other public purposes, we can see no legal objections to the use of it for a fire station, whatever might be the practical objections thereto.

We are therefore of the opinion that it would be perfectly lawful for the City to use either of the streets in question as a site for a fire station, provided Congress should give its consent thereto, and the appropriate ordinances were passed by the City Council; that, even without such congressional authorization, the construction of such a fire station in the overhead space over the stub end of Lake street, but resting on pillars placed on the surface of the street, would constitute, at most, a mere technical encroachment upon the street, which would not be restrained by the courts; that the construction of a building, however, built solidly on the surface of Lake street would constitute a much more serious encroachment upon the street; and that such a structure on Randolph street, which is a much busier, through street, would constitute an even more serious encroachment—so great, indeed, that its legality would be very doubtful.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Acceptance of License Fee From Checker Cab Co.—
Jurisdiction of Public Vehicle License Com-
mission to Determine Whether Company
or Drivers Own the Cabs.**

April 18, 1923.

HON. AGE ZYLSTRA, City Collector.

Dear Sir:

We are in receipt of your communication of the 17th instant, requesting an opinion relative to whether you may properly put through for payment a certified check tendered you on March 11, 1921, by the Checker Taxicab Company, for stand licenses for the year 1921, also what steps should be taken by your office with reference to the fees due for their licenses for the years 1922 and 1923. In reply we beg to state, that the answers to these questions depend entirely upon a question of fact which should first be determined by the Public Vehicle License Commission, namely, whether the Checker Taxicab Company is or is not the owner of the taxicabs in question. If it is the owner, it should pay the license fees, if it is not the owner, the proper owners should pay the fees and receive the licenses.

On March 25, 1921, we wrote the Superintendent of Police, as the representative of the Public Vehicle License Commission, pointing out that, under the ordinance, stand licenses can be issued only to *owners* of cabs, and concluded:

“Our conclusion is, therefore, that if the Commission finds that the Checker Taxicab Company is the *bona fide* owner of the taxicabs for which it is seeking licenses, and asserts such ownership for all purposes, when liabilities as well as when rights and privileges are concerned, the Commission ought to issue the requested licenses. But on the other hand, if the Commission finds that the Company is not the *bona fide* owner of the cabs, or that the ownership thereof is of such a doubtful or shifting nature as to make it doubtful whether a patron

could enforce a claim against the company, without becoming involved in vexatious litigation with drivers, who likewise claim ownership of the cabs, then we are of the opinion that the Commission would be justified in refusing such licenses."

We also stated in said letter of March 25, 1921, that, in our opinion, the Public Vehicle License Commission, although not a judicial body, had sufficient *quasi* judicial power to determine the *prima facie* ownership of the cabs.

On March 21st of the present year, upon a further inquiry from the Superintendent of Police, in behalf of said Commission, we again wrote him as follows:

"If the proper officials of the Checker Taxicab Company will give the Public Vehicle License Commission an affidavit stating that they are the owners of all the taxicabs they seek licenses for, and are operating all the taxicabs they seek licenses for, and that they are not raising issues in any lawsuits against the Checker Taxicab Company as to the ownership of such cabs, and the Public Vehicle License Commission is satisfied that the facts in the affidavit are true, we see no reason why the license should not be issued."

We have not been informed whether the Public Vehicle License Commission have as yet passed upon the matter or not. We would respectfully refer you to them for that information. We certainly believe that they ought to make a decision one way or the other. Upon their decision depends the answer to your questions. If they decide that the Checker Taxicab Co. is the *bona fide* owner of the cabs in question, it is our opinion that you ought to accept and cash the certified check mentioned. But if they are not such owners, the City ought not, by accepting any money from them, hold them out to the public as such owner and thereby become a party to a fraud upon the public—if such it is.

The matter of the license fees for 1922 and 1923 depend upon the same question. If the Checker Taxicab Company was (and is) the owner of the cabs during those years, then they, having operated the same, are liable for the license fees for such period, and your department ought to endeavor to

collect the same. If, however, other parties owned and operated the cabs, they are the ones liable for the license fees and you ought to endeavor to collect the same from them.

The mere fact that you have not accepted the check before, would not preclude you from accepting it now, if the facts should warrant such course. The fact that the Company demanded it back before your acceptance of the same, is, in our opinion, of no avail to them, since they did not accompany that demand with an offer to cease doing business on the City's streets.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Advisability of the City Entering Into a Contract With
a Foreign Corporation Not Licensed in the
State of Illinois.**

April 18, 1923.

HON. ALBERT A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of a communication from the Commissioner of Public Works under date of the 9th instant, requesting us to advise him if it is legal for him to enter into a contract in behalf of the City of Chicago with a corporation incorporated within the United States but not licensed in Illinois.

In reply, we beg leave to advise you that our Supreme Court, in the case of *Ryerson & Son v. Shaw*, 277 Ill., page 529, held that a corporation is an artificial entity existing only in contemplation of the law of its creation, and being

organized under the laws of a state had no existence beyond the boundaries of the state under whose law it was organized.

Our Supreme Court in the same case also held that the state in which a corporation is organized could not authorize it to exercise its franchise in any other state.

It is not necessary that a corporation organized in some other state in the United States should organize as a corporation in this state, but with the consent, and upon compliance with the provisions of the law of Illinois, a corporation organized outside of the State of Illinois may lawfully transact business in this state. Our statute provides what it is necessary for corporations organized under the laws of other states to do in order to be entitled to do business in this state.

Section 28a52 of Chapter 32, page 808, of Hurd's Illinois Revised Statutes of 1921, provides as follows:

"Section 80. Each foreign corporation organized for pecuniary profit, (except banking, insurance, building and loan and surety companies), not now licensed to do business in this State, shall, before it transacts any business or maintains an office in this State, procure a certificate of authority therefor from the Secretary of State. No certificate shall issue to any foreign corporation authorizing it to transact business in this State until the same portion of its capital stock is paid in as is required of like corporations organized under the laws of this State."

Section 28a66 of Chapter 32, page 811, of Hurd's Illinois Revised Statutes of 1921, provides as follows:

"Section 94. No foreign corporation doing business in this State without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this State upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor of not less than two hundred and fifty dollars nor more than one thousand dollars, to be recovered in any court of competent jurisdiction, in a civil action to be begun and prosecuted by the Attorney General."

After giving this matter careful consideration, we desire to advise you that contracts should not be entered into by

the Commissioner of Public Works of the City of Chicago on behalf of the City of Chicago with a corporation not incorporated under the laws of the State of Illinois, unless such corporation shall have secured a license to do business in Illinois in accordance with the provisions of the statute of our state regulating foreign corporations.

When you have been advised that any corporation doing business in the State of Illinois wants to make a contract to do work for the City of Chicago, and such corporation has not been organized under the laws of the State of Illinois, you should require it to produce a certificate from the Secretary of State of the State of Illinois licensing such corporation to do business in this state.

Yours very truly,

JAMES W. BREEN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Exemption from Water Rates of United States Hospital.

April 19, 1923.

HON. ALBERT A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Answering your inquiry for an opinion on the question of exempting the United States Veterans Hospital No. 30 Annex at 7531-41 Stony Island avenue, and 1535 East 74th street, from water charges, we wish to say:

The provisions of the Chicago Code exempting certain property from the payment of water rates does not include property of the United States. The ordinance reads as follows:

"Section 4128. Property that may be exempted from payment of water rates.) The commissioner of public works may exempt from the payment of water rates property herein enumerated as follows:

"(a) Such property as is used in the immediate conduct or carrying out of the purposes of any charitable, religious or educational institution, if application be made for such exemption to the commissioner of public works in the form prescribed by him, and if it shall appear to the satisfaction of said commissioner that such property is not used for gain or profit, or rented, conducted, operated or maintained for the purpose of producing revenue. As a prerequisite for the granting of such exemption, the commissioner of public works shall upon demand be provided with access to the financial records of such institution. Nothing contained in this paragraph shall be held to exempt property of the United States of America, of the State of Illinois, or of any of its political subdivisions except as hereinafter mentioned.

"(b) Such property of the State of Illinois as is used for an armory by the State or federalized national guard.

"(c) All property owned or leased by the City of Chicago, unless said City either as lessee or lessor shall enter into an agreement for the payment of rates by the other party.

"(d) Such property as the City Council has heretofore or may hereafter specifically exempt. * * *

During the world war, we advised that the charges for the United States Army Hospital No. 32, might be remitted under the exceptions made in favor of charitable institutions, principally because it was being used by the Government as a temporary hospital for its soldiers. A strict interpretation of the ordinance would indicate that the said hospitals are not classed as charitable, religious or educational institutions, and therefore, are not exempt from the payment of water rates.

Yours very truly,

CHARLES E. PEACE,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Compensation by City of Police Officers Injured in Performance of Duty.

April 19, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of a recent communication from your committee, relative to the case of *Police Sergeant John J. Mason*, who was seriously injured at Sheffield and North avenues, on November 17, 1922, through the negligence of Joseph J. Duffy, who, as you inform us, drove his automobile at that time and place, in such a careless manner that it ran up onto the sidewalk, struck a mail box and flung it against Sergeant Mason, and thereby seriously injured him, and finally came to a stop by hitting a building.

We note that your committee is desirous of paying Sergt. Mason his hospital expenses, amounting, so far, to \$358.05, and desire the Corporation Counsel to take steps to cause the said Duffy to reimburse the City for such expenses.

In our opinion no action by the City, against Duffy, would lie. Since the accident was not due to any fault of the City, and since the police do not come under the Workmen's Compensation Act, the payment of Sergt. Mason's hospital expenses would be a voluntary appropriation (although in conformity with a policy established by the City Council), and the City would not, by such payment, become subrogated to any rights Mason may have against Duffy. Any suit that might be brought would have to be brought in the name of Mason against Duffy, for personal injuries, which manifestly would be a private suit, in which the City of Chicago has no direct interest.

We do not understand that it is any part of the duties of the Corporation Counsel to represent members of the police force, or other municipal officers or employees, in any private

controversies. Indeed, our Supreme Court has gone so far as to hold that it is not even the duty of the Corporation Counsel to defend a police officer when sued for damages for false arrest.

City of Chicago v. Williams, 182 Ill. 135.

We would therefore suggest that it be left to Sergt. Mason, to institute and prosecute his own suit against Duffy. It might not be inappropriate, however, for the Committee on Finance, in case they pay his hospital expenses, to require from him an agreement to reimburse the City out of any judgment he may ultimately recover against Duffy.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payment for Overtime of Regular Employes in Election Commissioners' Office.

April 20, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In response to a letter received by us, on April 9, 1923, this department advised you that the payroll for the period covering March 16th to March 31st, 1923, totaling \$5,849.29, for overtime due to regular employes in the office of the Board of Election Commissioners, could not be paid.

This opinion was rendered under a misapprehension of the facts.

It appears from the presentation of these facts which we now have from the Board of Election Commissioners,

that the payments which were made and which were charged up against a specific appropriation of \$21,273.75, set apart for overtime for regular employees, were not all payments for overtime of regular employees.

The City Council, from time to time, prior to the passage of the annual appropriation bill, authorized payments to be made for overtime to regular employees and extra office employees, which were paid in due course and were all charged up against this fund of \$21,273.75.

This is not correct. Whatever was paid to extra office employees, whether it was overtime or regular time, should have been charged to the appropriation of \$200,000 designated as 25-A-2, but should not have been deducted from the sum of \$21,273.75 that was specifically set apart for overtime payroll for regular employees. When the money paid for regular employees' overtime only is taken out of this latter sum, you will find a sufficient amount in the appropriation thus specifically set apart to pay this overtime payroll amounting to \$5,849.29.

This misunderstanding came about by reason of the fact that the annual appropriation bill had not yet been passed when the former payrolls were made up, and the items were not segregated as they would have been in case the Election Commissioners had understood or known just how the appropriation would be made.

We, therefore, beg to advise you that such segregation should now be made, and when that is done it will enable you to pay the payroll in question and any other payroll for overtime of regular employees that may have been or will, in the future, be incurred, up to the sum of \$21,273.75.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Repeal of the "Juul Law."

April 20, 1923.

HON. WM. E. DEVER, Mayor.

Dear Sir:

About two months ago a communication was sent from this Department to the City Council recommending the repeal of the Juul Law, and asking the Council to go on record by resolution or otherwise with respect to this matter. This action on our part was prompted, first, by the belief that the Juul Law tended toward waste rather than economy, and, next, by the knowledge that there is a strong sentiment down state in favor of such a move, and the civic organizations of this city which keep close watch on taxation seem to be friendly to the proposal.

The session is too far advanced, however, to go ahead with this project. The Juul Law may be likened to the "Old Man of the Sea." It is very hard to get rid of. It requires the most thorough search of the statutes in order to ascertain what effect the wiping out of the provisions would have on the tax rate of each of the taxing authorities of the state, and it would probably require the passage of at least two dozen bills in order that no injustice to taxpayers should result. As an illustration, we point to the levy made by the Lincoln Park Board last year. If the Juul Law had been repealed without any provision for a maximum rate, the taxes of the residents of the Towns of North Chicago and Lake View would have gone up approximately \$2 on each \$100 of assessed value. It would seem as though it is impossible to avoid some increase in the total tax rate even without tampering with the situation. The City has increased its bonded indebtedness levy, there is a slight increase on the school text book levy, the South Park Commissioners will levy for the \$20,000,000 in bonds which they will issue, etc.

The Comptroller, Mr. O'Brien, is thoroughly conversant with all these things and will no doubt go over them with you in detail, if he has not already done so.

Nevertheless, we deem it our duty to call your attention specifically to this highly important matter, in order that you may determine what attitude to take on bills now pending which will raise tax rates if enacted. We understand you have already indicated your disapproval of the proposed increase in the library tax. There are other increases contemplated, however, such as an increase in the municipal pension rate, proposed maternity tax, etc., which ought to be considered.

With respect to the Juul Law, we shall endorse the bill introduced by Representative Keane (H. B. 554) which simply continues the present status for three years beginning with the year 1923.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of the City to Keep Structures Erected on
Municipal Pier by Lessee—What Structures
Are Fixtures.**

April 20, 1923.

HON. HUGO KRAUSE, Superintendent of the Municipal Pier.

Dear Sir:

We herewith render you an opinion as to the rights of the City in certain property on the Municipal Pier owned by the Chicago Concession and Catering Company and which

was attempted to be sold under a purported auction sale on Friday, April 20, 1923, at the Chicago Municipal Pier.

The lease between the Chicago Concession and Catering Company and the City of Chicago entered into on the 26th day of June, A. D. 1917, contains the following provision:

“At the termination of said contract, by lapse of time, or in event of its termination through default on the part of the concessionaire, all structures erected by the concessionaire shall become the property of the City of Chicago.”

This provision means that all structures which are erected by the concessionaire in the course of its business shall, at the termination of the contract, become the property of the City; and it is not necessary that the structures should be fixtures, that is, that they should be affixed to the pier itself.

Since the word “structure” was used in the lease and not the word “fixture,” any structure whatsoever such as ice boxes, stoves, ventilating machines, large coffee urns, large beer coolers, electric carbonizers, gas stoves, etc., is included within the meaning of the terms of the lease, and upon the termination of the said contract, becomes the property of the City of Chicago. This contract being now terminated, any auction sale purporting to sell the property of the concessionaire by order of court can only sell such property as the concessionaire owns.

Since all the above mentioned structures have become the property of the City of Chicago, they cannot be sold by the auctioneer, and it is the duty of the City to protect its rights and property in such structures by preventing their being carried away.

We therefore advise you that it is your duty to instruct policemen detailed under you that the above mentioned structures cannot be carried away by persons buying them at an auction sale with notice of the City's interest in the same, and the structures should, under no circumstances, be allowed to be removed from the premises of the Municipal Pier un-

less under an order of court or until further notice from this office.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of Commissioners of West Pullman Park District
to Employ Motorcycle Policemen and to Authorize
Such Policemen to Carry Arms.**

April 20, 1923.

MR. WALTER G. DAVIS, President, West Pullman Park District.

Dear Sir:

We have your communication of the 17th instant in which you state that the West Pullman Park District is about to install one or two motorcycle officers for the purpose of looking after the maintenance of the vehicle laws on streets within the boundary of said West Pullman Park District, and we note your request for an opinion from the Corporation Counsel as to the right of such motorcycle officers to carry arms and to enforce the said vehicle laws on the streets within the park district.

If the officers in question would come under the classification of "policemen, or other peace officers," we are of the opinion that there can be no question that they have the right to carry arms. The act relative to deadly weapons (Hurd's Stat. 1921, Chap. 38, Pars. 54-a to 54-g) provides in Section 4:

"It shall be unlawful for any person to carry concealed upon his person, any pistol, revolver, or other

firearms, without a written license therefor, issued as hereinafter prescribed in this section. * * *

But Section 5 thereupon makes certain exceptions, as follows:

“Section Four (4) of this act shall not apply to sheriffs, coroners, constables, *policemen*, or *other peace officers*, or any warden, superintendent or head-keeper of any prison, penitentiary, county jail or other institution for the detention of persons convicted of or accused of crime, while engaged in the discharge of their official duties, or to any person summoned by any such officer to assist in making arrest, or preserving the peace, while such person so summoned is engaged in assisting such officer, or to the regular and ordinary transportation and sale of firearms as merchandise.”

If these officers are policemen, or other peace officers, therefore, they clearly are not forbidden to carry arms.

The question might be raised whether the president and trustees of a park district like the one in question have any authority to appoint any policemen. Parks organized under the Act of 1871 have been given specific power in that regard. In Hurd's Stat. of 1921, Chap. 105, Par. 21, we read:

“The commissioners of any such park may appoint and support a police force.”

The Act of 1893, for the creation of Pleasure Driveways and Park Districts, under which we understand your park district is organized, is not so specific, however. It merely says that the president and trustees

“shall exercise all the powers and manage and control all the officers and property of such district.”

Hurd's Stat., Chap. 105, Par. 110.

But we believe that this must be interpreted to mean that they are authorized to use any necessary means to that end, and that in determining what means are necessary, they have the right to consider what means the governing authorities of other parks or park districts have found it necessary to employ.

An enumeration of the powers and duties of the president and trustees of such park district will show that some kind of a police force (by whatever name it may be called) is absolutely indispensable. Section 7 of the act reads in part as follows:

"The corporate authorities of such pleasure drive-way and park district may, by ordinance, regulate, restrain and control the speed of travel upon the same, and in all things may regulate, restrain and control the use of said pleasure driveways and parks by the public or individuals, and may exclude therefrom funeral processions, hearses and traffic teams and vehicles, so as to free the same from any and all business traffic or objectionable travel, and may prescribe by ordinance such fines and penalties for the violation thereof, as cities or villages are allowed by law to prescribe for the violation of such ordinances."

Hurd's Stat., Chap. 105, Par. 113.

Manifestly, these powers and duties cannot be properly exercised without some sort of police officers to attend to the practical enforcement of the laws, and we are therefore of the opinion that the trustees of the park district have implied power to appoint such officers.

Needless to say, however, the authority of such police officers would not necessarily extend to every street within the *geographical limits* of the park district but only to such streets as have been placed *under the jurisdiction* of the trustees or commissioners of such district.

For the reasons above stated, we are of the opinion that the West Pullman Park District has the authority to appoint such motorcycle officers to enforce the vehicle laws on the streets subject to the jurisdiction of the commissioners of such park district, and that such officers are authorized to carry firearms.

Yours very truly,

CARL J. APPELL,

Approved: Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

**Collection of Unpaid Inspection Fees From Insolvent
Concern—Right to Refuse Permit to Person
Now Occupying the Location.**

April 21, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of a request from your department for an opinion relative to the status of the Mid-City Electric Shop, which in January last year, as we are informed, entered into a certain agreement with its creditors, by the terms of which, upon the company's subsequent default, its assets were afterwards sold at public auction, and are now ready for distribution, among its creditors, one of them being the City of Chicago, to which it owes several hundred dollars for unpaid inspection fees.

To your question whether this is equivalent to an adjudication in bankruptcy, we must answer that such is not the case. Doubtless the company is insolvent, but there has been no adjudication of the fact. The proceedings constitute simply a private arrangement between the company and its creditors. Unless the City was a party to that agreement, which we do not understand to have been the case, it is not bound thereby. So far as the City is concerned, the company occupies the ordinary position of a debtor who may not be able to pay the full amount of his debt, and with whom it may therefore be a wise policy to compromise; but such a compromise will have to be first authorized by the City Council. Nothing that has occurred so far would authorize the Comptroller to accept anything less than the full amount of the City's claim.

In reply to your second question, namely, whether the City has the right to refuse the issuance of permits to the present owner of the license, who is acting as an individual,

we beg to state that if, as we understand the facts to be, the present owner of the license is not in any way connected with the company, or acting, directly or indirectly for its benefit, but is *bona fide* in business for himself, and is not delinquent in any way to the City, you have no right to refuse him a license, simply because the party who formerly occupied the same place of business may happen to be in arrears to the City.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Relation of Police Department to Other Departments in Closing Unsafe Buildings.

April 21, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We are in receipt of a recent communication from your department signed by your predecessor, Honorable Charles C. Fitzmorris, and enclosing a letter from one Henry J. Sharpe, who represents himself to be one of the lessees of the Lyceum Theatre building, 3851 Cottage Grove avenue, and notifies you to close the same immediately, stating that the same is unsafe, unsanitary and a veritable fire trap, and we note your request for advice as to the proper manner for your department to proceed.

We note that Mr. Sharpe's letter purports to be addressed also to the Building Department, Health Department, Fire Department and Electrical Department.

Under the provisions of the Municipal Code, it is primarily the duty of the Commissioner of Buildings to investigate and determine whether a building is unsafe in construction (Chicago Municipal Code of 1922, Secs. 403-406); and the duty of the Commissioner of Health to determine whether a building is unsanitary (Chicago Municipal Code of 1922, Secs. 2162-2168), and we assume that they will do their duty in this case.

We do not understand that either the general law or the ordinances make it the duty of your department to take the initiative in a matter of this nature, but only to render such assistance to the other departments above mentioned as may be required and give such general co-operation as the welfare of the public may demand.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Unlawfulness and Suppression of "Marathon Dances."

April 23, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In reply to your request for an opinion relative to your power and authority, as Superintendent of Police, to suppress the so-called marathon dance, advertised to take place at The Trianon dance hall, in this city, on next Tuesday evening, we respectfully submit the following:

We understand that a distinguishing feature of such a dance is that it is in the nature of a physical endurance con-

test and that persons taking part in the same are encouraged to, and usually do, dance until they collapse from sheer exhaustion; and we learn from the public press, that in other cities where such dances have been held, many of the dancers have had to be taken to hospitals and some have even died as the result of such dancing.

A performance so riotous as to result in death or permanently ruined health, must, in our opinion, be considered as at least a breach of the peace and disorderly conduct, if not a more serious crime. As the Marathon dance is of very recent origin, it is hardly to be expected that we should find any statutes, or Supreme Court decisions forbidding the same *by name*. But if it can be considered as merely a new form or manifestation of an ancient offense, it is unlawful, even though it may not have been expressly forbidden by name.

We are of the opinion that the Marathon dance, as we are informed it is being conducted, is, despite its sanction by many so-called socially prominent people, nothing else in its ultimate analysis, than a new form of the statutory crime of *riot*.

Section 249 of the Criminal Code of Illinois defines a "*riot*" as follows:

"If two or more persons actually do an unlawful act, with force or violence, against the person or property of another, with or without a common cause or quarrel, *or even do a lawful act in a violent and tumultuous manner*, the persons so offending shall be deemed guilty of a riot, and shall severally be fined not exceeding \$200 or confined in the county jail not exceeding six months."

While dancing in general may be regarded as a lawful act, yet if conducted in such a manner as to result in death, or in the immediate, and more or less permanent, ruination of the health of those engaging therein, it is certainly conducted "in a violent manner." (For "violence," as defined by Webster, means the active exertion of a large amount of force or strength, whether it be done suddenly, or in a manner less sudden but productive of similar results.) And since

such dire consequences, as death, and collapse from exhaustion, can not fail to produce agitation, confusion, disorder and disturbance (which constitute definitions of "tumult"), it can hardly be disputed that dances producing such results, are conducted "in a tumultuous manner."

That we have not given too broad a meaning of the word "riot," will be seen by a reference to the definitions given of that word in the standard dictionaries. Thus, the Century Dictionary gives, among others, the following definitions of the word "riot."

"Boisterous and excessive festivity; revelry."

Indeed, this is such an old and established meaning of the word, that it must be presumed that the legislature had it fully in mind when they defined "riot" to include, "to do a lawful act in a violent and tumultuous manner." What the legislature meant especially to forbid, by those words, was probably just such unrestrained and dangerous revelries, known to literary writers as "riots," though not formerly included in the common law crime of that name.

In this literary sense of the word, riots formerly included drunken orgies, at which participants were apt to, and sometimes did, lose their lives through excessive drinking, or through being struck by some missile, hurled by a hilarious companion. We do not believe that any distinction can be made in law between death caused by excessive drinking and death caused by excessive dancing; nor do we believe that to be danced to death can be considered any more humane form of death than to be struck over the head with a liquor bottle. In our opinion, both of these forms of revelry come within the statutory definition of a riot.

If we are correct in our opinion, above expressed, that a Marathon dance, conducted as aforesaid, constitutes a riot, then it necessarily follows that those who assemble to take part in the same, assemble to "commit an unlawful act." Concerning such unlawful assembly and the manner of suppressing the same, Sections 251 to 253, inclusive, of the Criminal Code of Illinois have the following to say:

“Sec. 251. If two or more persons shall assemble together *to do an unlawful act*, and shall separate without doing or advancing towards it, such persons shall be deemed guilty of an unlawful assembly, and be severally fined not exceeding \$100.

Sec. 252. If two or more persons assemble for the purpose of disturbing the public peace, *or committing any unlawful act*, and do not disperse on being desired or commanded so to do by a judge, justice of the peace, sheriff, coroner, constable, or other public officer, the persons so offending shall be severally fined not exceeding \$200.

Sec. 253. When twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more, armed or unarmed, are unlawfully, riotously and tumultuously assembled, in any city, town or village, it shall be the duty of each of the municipal officers, constables and justices of the peace thereof, and of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as they can safely go, and in the name of the State to command them to immediately and peaceably disperse, and if they do not obey, such officers shall command the assistance of all persons present, in arresting and securing the persons so unlawfully assembled; and every person refusing to disperse or to assist as aforesaid, shall be deemed one of such unlawful assembly, and shall be fined not exceeding \$500, and confined in the county jail not exceeding one year; and each such officer having notice of such unlawful assembly, and refusing or neglecting to do his duty in relation thereto, as aforesaid, shall be fined not exceeding \$200.”

As a further objection to such a Marathon dance, it might be urged that, in so far as women are invited to dance more than 10 hours in any 24 hour period, it constitutes a violation of the statute relative to the employment of women. In Hurd's Statutes of Illinois, Chapter 48, Section 121, we read:

“No female shall be employed in any * * * place of amusement, * * * more than ten hours during any one day.”

Whether this statute applies to a case of this nature, depends upon the meaning of the word “employed” or, in

other words, whether a woman engaged in dancing, without pay, but for her own amusement, though at the instigation of some other person or group of persons, is "employed." It may be admitted that the word "employed" *frequently* means "employed for wages or at a salary." Possibly it is more often used in that sense than in any other. But while the legislature may have had specially in mind women working for wages, there is nothing to indicate that they meant to limit the law to them. A reference to the dictionaries will show that the word "employ" is by no means confined to such meaning. Thus, in the Century Dictionary, we find this definition of the word:

"To give occupation to; to make use of the time, attention, or labor of; *to keep busy*, or at work."

Surely, no one will question that women invited to dance in such a Marathon dance are "kept busy."

In the case of *Ritchie & Co. v. Wayman*, 244 Ill. 509, the Supreme Court, in sustaining the validity of the above law, said that it should be borne in mind that the act was passed to protect the health of women and should be interpreted from that point of view. Such being the case, we do not believe that the courts would, or should, so far as this law is concerned, draw any distinction between a woman dancing in a Marathon contest for pay or hire, and one dancing without pay. One is as dangerously employed as the other, the danger to the health of one is as great as to the other, and the law ought, therefore, to be equally applied to both.

For the reasons above stated, we are of the opinion that if those in charge of the contemplated Marathon dance shall permit any women to dance there for more than 10 hours in any 24 hour period, they will be guilty of violating the Women's Employment Act. But further than that, we are of the opinion that such Marathon dance comes within the statutory definition of a riot and is therefore unlawful, and that those who may assemble to take part in the same will be guilty of an unlawful assembly, and that you, as Superintendent of Police, have the power and authority to prevent

such unlawful performance and disperse such unlawful assembly.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Power of Commissioner of Gas and Electricity to Let Contracts Under the Code of 1922.

April 24, 1923.

HON. GEORGE E. CARLSON, Commissioner of Gas and Electricity.

Dear Sir:

We have your letter of April 23, 1923, in which you call our attention to the fact that the ordinance which authorized the Commissioner of Gas and Electricity to let contracts had been omitted from the Chicago Municipal Code of 1922.

Section 826 of the Chicago Code of 1911 which originally contained the provision authorizing the award of contracts by the Commissioner of Gas and Electricity was amended by the City Council on August 22, 1918 (page 1099 of the Journal of the Proceedings of the City Council of said date), and the provision containing this authority was omitted at that time. As to whether this omission was intentional on the part of the City Council or if it was an error on the part of the person who drafted the ordinance in 1918, we of course are unable to state.

You request us to advise you as to whether you have the authority to award contracts under the ordinances as they

exist at the present time, and if you have not, you ask us what steps are necessary in order to give you that authority. Answering your first question, it is our opinion that you have not authority to let any contracts at the present time, therefore, in accordance with your second request we have prepared and herewith transmit to you an amendment to the Chicago Municipal Code of 1922.

We would suggest that you transmit the said amendment together with this communication to the City Council and in the event the City Council sees fit to pass the amendment, you will then have the power to award contracts.

Yours respectfully,

FRANK W. DERBY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payment for Work in Constructing Police and Fire Engine Houses.

April 24, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your communication of April 19, 1923, requesting us to advise you if you can legally pay Butler & Company the sum of \$12,000 upon presentation of a voucher for that amount properly approved.

In reply, we beg to advise you that on March 6, 1923, the City Council passed the following order:

“ORDERED, That the Commissioner of Public Works be and he is hereby authorized and directed to issue a voucher in favor of Butler & Company in the sum of twelve thousand (\$12,000.00) dollars, same to be in full of all claims on four contracts entered into with the City during 1916 and 1917, namely, on fire engine houses at 1713 North Springfield avenue, 712 North Kedzie ave-

nue and 430 West 104th street, and police station at Racine avenue and Superior street, and charge same to appropriations to be made for the Department of Public Works for the year 1923.”

In the annual appropriation bill for the year of 1923, passed March 31, 1923 (page 2298 of the Council Journal of said date), the City Council specifically appropriated for the payment of this claim under Account 430-X-26 “for the payment of claim of Butler & Company..\$12,000.00.”

The claim of Butler & Company is for a balance due them for work performed under various contracts with the City of Chicago, entered into during the years of 1916 and 1917, for the construction of police stations and engine houses, and is a corporate liability against the City for which the City Council has the power and authority to authorize and direct payment. The voucher issued for the said \$12,000 has been approved by the City Architect, the Commissioner of Public Works and the Superintendent of Police, is legal in form, and the City Council, having appropriated the sum of \$12,000 to pay same, you, as Comptroller, may lawfully cause a warrant to be drawn on the City Treasurer for the said sum.

The fact that this sum has been appropriated from the Police Department Building Bond Fund, and is to pay for the construction of a fire engine house as well as police stations, is immaterial, because the City Council has the power to appropriate money from the Police Department Building Bond Fund to pay for a balance due on a contract for the construction of a fire engine house.

We, therefore, recommend that a warrant be drawn upon the city treasurer in payment of the claim of Butler & Company for the sum of \$12,000.

We return the voucher forwarded to us.

Yours very truly,

JAMES W. BREEN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Liability of City to Pay Gas Company for Work Done
in Relocating Pipes in Order to Allow the
City to Lay Water Mains.**

April 24, 1923.

HON. ALBERT A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your recent communication, enclosing bills (totaling \$2,054.37) from the Peoples Gas Light & Coke Co. for work done by them in removing and relocating their gas mains in Morgan street from Blue Island avenue to Grand avenue, to enable the City to extend its water mains on that street.

We note your reference to an agreement between this department and the attorneys for the gas company for a temporary postponement of the decision of the question of the City's liability for these bills, but would say that we have no record of any such agreement, although we do not question that there may, perhaps, have been some such understanding between a former member of this department and the attorneys for the gas company. However, that is a matter of but temporary consequence, for the question must sooner or later be answered, "Is the City liable to the gas company in this case for the expenses of said company in moving its gas mains?"

After a careful examination of the authorities and the franchise ordinance under which the gas company is operating, we are forced to the conclusion that the City cannot escape liability for this claim, for in operating the water works system the City is not acting in a governmental capacity, but is conducting a private business, although one "impressed with a public interest," just as the gas company is doing. And the courts have held that where a city is thus operating a private business, in its proprietary and not in

its governmental capacity, it has no greater rights or authority than a private corporation engaged in the same business would have.

Thus, for instance, if, after the gas company has, under a contract with the City, laid its gas mains in the streets, a private water company, under similar authority, should desire to lay its water mains in the same street, it would hardly be contended that the latter company could compel the gas company to move its mains, at its own expense, merely to make it more convenient for the water company. Or, to take another illustration, if after the gas company has, under such authority, laid its gas mains in the streets, the city should start a rival business of manufacturing and selling gas, the city would hardly claim the right to compel the gas company, before the expiration of its franchise, to move its gas mains, at its own expense, just to make it the more convenient for the city to engage in a rival business (or in a similar business whether there be any actual rivalry or not).

The same principle, we believe, applies to this case. The gas company is engaged in a private business impressed with a public interest, and the City, in operating the water system, is also engaged in a private business impressed with a public interest. So long as the gas company's franchise is still in force, therefore, it has just as much right to use the street for its gas mains as the City has to use it for its water mains. Of course, it has no right to *monopolize* the street, or prevent the City (or any company licensed by the City) from laying down its water mains there. But if after the gas company has once laid down its mains in places designated by the City, the City wants them moved, not in the interest of public health and safety, but merely for the accommodation of the City's private business of distributing and selling water, then the City must expect to reimburse the gas company for any legitimate expenses it may be put to in thus moving its gas mains.

That the City operates its water works system in a private and not a governmental capacity, is well settled.

In the case of *Wagner v. City of Rock Island*, 146 Ill. 139, in quoting from *Appeal of Brumm*, 12 Atlantic Reporter, 855, our Supreme Court said:

“A municipal corporation which supplies its inhabitants with gas or water does so *in its capacity of a private corporation*, and not in the exercise of its powers of local sovereignty. If this power is granted to a borough or city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. In separating the two powers—public and private—regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character; but if the grant was for purposes of private advantages and emolument, though the public may derive a common benefit therefrom, the corporation *quo ad hoc* is to be regarded as a private company. *It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.*”

In *City of Litchfield v. Litchfield Water Supply Co.*, 95 Ill. App. 617, the court said:

“When a municipal corporation undertakes to operate waterworks, it does so in the exercise of its private and not of its governmental function.”

In *City of Chicago v. Selz, Schwab & Co.*, 104 Ill. 376, which was an action brought against the City for damages occasioned by the flooding of the plaintiff's basement and damaging a large quantity of goods by reason of a broken hydrant, the court, in holding the City liable, said:

“The waterworks system was not constructed, nor is it used solely for fire protection, nor in the exercise merely of the City's governmental functions. It is a business which may be carried on under a proper franchise by a private corporation. The facts are undisputed that while this was a fire hydrant it was also a source of supply of water sold to street sprinkling contractors. Though impressed with a public use because conferred for the public advantage, yet the authority to supply citizens of the municipality with water is not exercised

by appellant solely in pursuance of its powers of sovereignty. In its capacity as a private corporation, 'it stands upon the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.' *Wagner v. City of Rock Island*, 146 Ill. 154-155. It is therefore liable to actions for damages in the same manner as such individual or private corporation would be under like circumstances."

In the case of *Holmes v. City of Chicago*, 203 Ill. App. 445, which was a suit for payment for work done in blasting rock, etc., for a trench for a water pipe, done at the request of the Commissioner of Public Works, though no appropriation had been made therefor by the City Council, the court said:

"It is admitted that the City by accepting the benefit of O'Laughlin's work is estopped from denying the validity of his employment, if, in laying said water pipe, and extending its system of waterworks, *it was acting in its private capacity*. It is well settled that when a municipal corporation undertakes to construct and operate waterworks it does so in the exercise of its private and not its governmental functions (*Wagner v. City of Rock Island*, 146 Ill. 139; *City of Litchfield v. Litchfield Water Supply Co.*, 95 Ill. App. 647); and it therefore follows that the City in the instant case was acting in a private capacity, and having accepted the benefits of the contract is estopped from denying its validity. *City of Chicago v. Norton Milling Co.*, 196 Ill. 580."

Of course, if the City had reserved the right to require the gas company to move its pipes and mains whenever the City officials should so desire, a different rule would apply. But we find no provision to that effect in the contract between the City and the gas company.

Section 1 of "An ordinance concerning the People's Gas Light and Coke Company" reads in part as follows:

"BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF CHICAGO. Section 1. That permission and authority be and the same is hereby granted to the Peoples Gas Light and Coke Company, of the City of Chicago and State of Illinois, to lay their gas mains, pipes, feed-

ers and service pipes in any of the streets, alleys, avenues, highways, public parks or squares throughout said city, *subject at all times, however, to the resolutions and ordinances of the Common Council of said city.*"

In our opinion the words "subject at all times, however, to the resolutions and ordinances of the common council of said city," must be construed to refer only to resolutions and ordinances relative to the manner of laying the pipes, etc. (securing the necessary permits, etc.) and can not be interpreted to mean that the City Council reserved the power of requiring the company to remove their pipes before their franchise has expired, or to move and relocate them at their own expense, at the arbitrary will and pleasure of the City Council. If a reservation of such importance had been intended, we must presume that it would have been expressed in clear and unmistakable language. But in any event the company took its franchise subject only to the "*resolutions and ordinances*" of the City Council, and that body has never passed any resolutions or ordinances requiring the company to remove its pipes at its own expense.

We have assumed in this discussion, so far, that the expenses of the gas company in this matter were due solely to the extension of its water pipes by the City. If such were not the facts, however; if, for instance, the facts were that the City ordered the gas company to move its gas mains for reasons of public health and safety, then a different rule of law would apply. For the law is well settled that even though a City may not, in its contract with a public service company, have reserved the right to require it to move its gas pipes or other equipment, at the pleasure of the City (and we find no such reservation in the franchise of the gas company), nevertheless, should public safety and health require it, the City may still, under its *police power*, require the public service company to make such necessary changes at its own expense. This is on the theory that the police power is a governmental power that cannot be contracted away.

In the case of *New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453, a gas company had been authorized to lay its gas pipes in the streets of the City of New Orleans. Later the City decided to build a system of sewers in the streets and demanded that the gas company move its gas pipes at its own expense to make room for the sewers. The Supreme Court of the United States held that the City had authority to do this, because sewers were necessary to the health of the City.

The court said:

"It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes. It is not contended that the gas company has acquired such a property right as will prevent the Drainage Commission, in the exercise of the police power granted to it by the State, from removing the pipes so as to make room for its work, but it is insisted that this can only be done upon terms of compensation for the cost of removal. * * *

"The drainage of the City in the interest of the *public health* and welfare is one of the most important purposes for which the *police power* can be exercised. * * * The police power, in so far as its exercise is essential to the health of the community, it has been held, cannot be contracted away."

To the same effect are the following cases:

Union Bridge v. United States, 204 U. S. 364.

C. B. & Q. Ry. Co. v. Drainage Comrs., 200 U. S. 561.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 226.

Natl. Water Works Co. v. City of Kansas, 28 Fed. 921.

Moore v. New Orleans Waterworks Co., 114 Fed. 380.

Jamaica Pond Aqueduct Co. v. Brookline, 121 Mass. 5.

Matter of Deering, 93 N. Y. 361.

If, therefore, the removal of the gas mains in this case was for the benefit of the public health or safety (a question of fact for your Department to determine), then the City could, under that comprehensive governmental power known as the police power, compel their removal at the gas company's expense. But on the other hand, if their removal was solely for the convenience of the City in its private business capacity of distributing and selling water, then the gas company would, in our opinion, be entitled to be reimbursed for its expenses in moving its gas mains.

We do not wish to be understood as passing upon the correctness of the *amount* of the bills rendered. That is a matter that should be verified by your department.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Rights of the City in North Melvina Avenue Between Dickens Street and Armitage Avenue.

April 26, 1923.

HON. ALBERT A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In reply to your request for an opinion as to what rights, if any, the City has in a 33 foot strip off the east side of the West Half of the Northwest Quarter of Section 32, Township 40 North, Range 13 East of the 3d P. M., between Armitage avenue and Dickens street, by reason of the fact that the City has laid and maintains a water pipe under the same (laid under an impression that said strip was a part of Melvina avenue), we respectfully submit the following:

From an examination of the records of the Map Department it does not appear that said strip has ever been dedicated as a part of a street; on the contrary, North Melvina avenue, at that place, is shown to be only 33 feet wide, all of which is located east of said strip.

Moreover, on March 14, 1923, the City Council passed an ordinance vacating all of that part of North Melvina avenue, lying between Armitage avenue and Dickens street, describing it as follows:

"All that part of North Melvina Avenue (*being thirty-three (33) feet wide*) west of and adjoining the west line of said Block twenty-eight (28) * * * in Grand Avenue Estates, being a subdivision of the West Half (W. $\frac{1}{2}$) of the East Half (E. $\frac{1}{2}$) of the Northwest Quarter (N. W. $\frac{1}{4}$) of Section thirty-two (32), Township Forty (40) North, Range thirteen (13) East of the Third Principal Meridian."

Council Proceedings, March 14, 1923, p. 2052.

It will be observed from the foregoing ordinance:

- 1) That the City Council expressly recognized that Melvina avenue, at that place, was only 33 feet wide.
- 2) That, whatever its width might be, *all* of it (between Armitage avenue and Dickens street) was vacated.

We note, from the correspondence submitted by you, that the water pipe in question was laid in September, 1921. This is entirely too short a period for the City to have acquired any rights by *prescription*, and we do not understand that the City ever entered into any contract with the owners of the property for leave to lay the water pipe on their land.

For the reasons above stated, we regret to say, that, in our opinion, the City has no rights whatever in the strip in question, and if the owners of the property insist on it, the City will have to remove its water pipe from their land.

Yours very truly,

CARL J. APPELL,

Approved: FRANCIS X. BUSCH, *Assistant Corporation Counsel.*
Corporation Counsel.

**Bill for Exemption of Personal Property to the Extent
of \$1,500 From Taxation.**

April 28, 1923.

HON. JOHN H. LYLE, Chairman Committee on Judiciary.

Dear Sir:

We are in receipt of your letter of recent date concerning proposed bill for submission to the Legislature, exempting personal property to the amount of \$1,500 from taxation. You state that your committee desires an opinion as to whether the General Assembly has the power to provide for any exemption of personal property from taxation.

Such an exemption as you speak of would be unconstitutional. Under Section 3 of Article IX of the Constitution certain exemptions are permissible. These are "the property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes." Aside from these subjects there can be no exemption, as Section 1 of the same article states that "the general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property," and the enumeration in Section 3 of the exceptions that may be made has been held repeatedly to preclude the making of any other exceptions.

"In the construction of statutes it is a well understood rule that the enumeration of certain specified things which may be exempted excludes all others not therein mentioned. Section 3 is therefore a limitation on the power of the legislature. The enumeration in that section of certain specified property which may be exempted is a clear limitation upon the power of the legislature to exempt any other property."

Loan & Homestead Assn. v. Keith, 153 Ill. 609.

“Any exemption from the rule of equality established by Section 1 of Article IX outside of the kinds of property enumerated in Section 3 of that article is absolutely prohibited.”

Consolidated Coal Co. v. Miller, 236 Ill. 149.

Other authorities could be cited, but they are all to the same effect. Under our present constitution every person is supposed to pay a tax on his property. This, of course, includes personal property. The mere fact that he has only a small amount of property does not exempt him, and it is not possible for the Legislature to provide for such an exemption.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Validity of Lease Between City of Chicago and Chicago Steamship Lines.

April 30, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Pursuant to your request for an opinion on the validity of a lease between the City of Chicago and the Chicago Steamship Lines on the 6th day of April, A. D. 1923, leasing docking facilities and floor space on the Municipal Pier of the City of Chicago, we beg to submit the following:

The right to lease floor space and docking facilities upon the Municipal Pier as well as the right to erect all harbor structures is conferred on the City by the Harbor Act of 1913, and all action taken by the City in this regard must

be strictly governed by, and come within the purview of the provisions of this act. All procedure outlined in this act in regard to the leasing of harbor facilities, must be strictly followed,—otherwise the lease would be invalid. For it is well established law, that when the legislature has by statute designated a particular way in which a municipality shall act, such procedure is exclusive, and the municipality, being a mere creature of statute, may act in no other way. As authority for this proposition, the following cases are cited:

Gaddis v. Richland County, 92 Ill. 119, at 123.

Helm v. City of Grayville, 224 Ill. 274, at 278.

City of Mt. Carmel v. Shaw, 52 Ill. App. 429, at 433.

The sections of the Harbor Act of 1913 contained in Chapter 24 of Smith's Illinois Revised Statutes for 1921 on page 295 and which are germane to this inquiry, are as follows:

"598. CITY MAY ACQUIRE HARBOR, STRUCTURES, FACILITIES, WAREHOUSES, TERMINALS, ETC.) Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every city and village in this State shall have the right, power and authority, and such right, power and authority are hereby granted to acquire, own, construct, maintain and operate anywhere within the jurisdiction or limits of the city or village, or in, over and upon any public waters bordering thereon, harbors, canals, slips, wharves, docks, levees, piers, quay walls, breakwaters and all appropriate harbor structures, facilities, connections and improvements, and in connection therewith to acquire, own, construct, maintain and operate such elevators, vaults and warehouses (including cold storage warehouses), as may be necessary adjuncts or incidental to transportation and railroad terminals, and to acquire, own, construct, maintain and operate all other necessary or appropriate terminal facilities."

"600. MAY LEASE UTILITIES AND FIX RATES—LIMITATION.) Section 3. Every such city and village shall have the power to lease portions of any of the utilities mentioned in Section One of this act, for a period not longer than twenty (20) years on such terms

and conditions as shall be prescribed by ordinance, and to fix and regulate the rates and charges for the use of such utilities, whether owned and operated by such city or village, or are operated by persons or corporations who are tenants to such city or village or are constructed, owned and operated by any public or municipal corporation as hereinafter provided: Provided, however, that except as to railroad facilities at least one-third of the capacity of each such utility shall not be leased for a period to exceed one year and that at least one-half of said one-third shall at all times be reserved by such city or village for general public use, and that not to exceed fifty per cent in capacity of the remaining two-thirds capacity of each such utility shall be leased to any one person or corporation: Provided, further, however, that no leases authorized under this act shall contain conditions which shall admit of any unjust, undue or unreasonable preference or discrimination between lessees."

"615. MAY USE UTILITY FOR RECREATION PURPOSES.)

Section 17a. Every such city and village shall also have the right, power and authority and such right, power and authority are hereby granted to use for public recreation purposes any portion of any such utility which is not immediately needed for transportation uses or which can be used for such recreation purposes without interfering with the use of such utility for transportation purposes in the judgment of the corporate authorities of such city or village. (Added by Act approved May 18, 1917.)"

It remains, then, to examine the present lease, in order to ascertain whether or not it complies strictly with the above quoted portion of the statute. Briefly stated, the facts are as follows: On the 6th day of April, A. D. 1923, the City under the auspices of the outgoing administration, entered into a lease with the Chicago Steamship Lines, Inc. The premises leased were described as follows:

"The East 140,000 square feet of the west 180,000 square feet of floor space on the first floor of the south shed Municipal Pier with the Dock alongside of said premises."

The term of the lease was from the first day of April, A. D. 1923, until the thirty-first day of March, A. D. 1928. The

rent was the sum of twenty-eight thousand dollars (\$28,000) per year, payable in monthly installments of two thousand three hundred thirty-three dollars and thirty-three cents (\$2,333.33). This sum would amount to a rent of twenty cents per square foot. This same lessee under the terms of its former lease had only sixty-seven thousand square feet. At present the Chicago Steamship Lines owns but one boat. The said company has offered various other companies who are applying for space on the pier to sublease space to them at a rental of thirty-five cents per square foot. In linear feet along the dock of the pier, the lessee under this lease acquired 1,400 feet.

In order to determine what proportion this sum constitutes of the capacity of the entire pier, the capacity of the pier must first be ascertained, for it will be noted that the above quoted Section 3 of the Harbor Act in the proviso thereto attached uses the language, "Provided, however, that * * * at least one-third of the *capacity* of each such utility shall not be leased for a period to exceed one year, etc." The word "capacity" is defined in Volume 1 of the Century Dictionary, page 802, in the following terms:

"*Capacity*—1. The power of receiving or containing; specifically, the power of containing a certain quantity exactly; cubic contents."

In the case of *Clifton v. Sheldon*, 66 U. S. (1 Black) 494, at 500, 17 L. Ed. 155, where the contract between the shipper of goods and the master of a vessel referred to the capacity of the vessel, and it appeared that the shipper refused to allow an agreement to be placed in the bill of lading to the effect that part of the cargo might be carried on deck, it was held that the phrase "capacity of the vessel" refers to its underdeck capacity. In that case there was also space upon the deck of the vessel itself, but it was held that capacity for the particular purpose of storage was the capacity of the vessel which was adapted to storage purposes—namely, the underdeck capacity. So here there is other space on the pier, but that space is not adapted to transportation purposes, and

therefore should not be considered in computing the capacity of the pier for such purposes.

Clearly, therefore, only those portions of the pier which are adapted to docking and storage purposes, come within the connotation of the word "capacity." For the purpose of the statute as clearly manifest in the act itself is to provide transportation facilities in connection with harbor structures. This intention can be gathered from the language of Section 1 of the said act where the legislature confers the right upon the City to erect various harbor structures, "and in connection therewith to acquire, own, construct, maintain and operate such elevators, vaults and warehouses (including cold storage warehouses), as may be necessary adjuncts or incidental to transportation and railroad terminals, and to acquire, own, construct, maintain and operate all other necessary or appropriate terminal facilities."

Therefore, in considering what is properly meant by the "capacity" of the pier, it must be borne in mind that the purpose of the pier is to provide accommodations both for docking the freight, or passengers, for storing the freight for a temporary time prior to its being removed, and for conveniently loading and carrying it away.

Examining the "capacity" of the pier with these points in view, the east of the pier, which is devoted purely to recreational purposes and which has no facilities and cannot be used for the docking of ships is clearly excluded. The length of the pier accommodated for docking purposes from the shore dock to the beginning of the recreational end (which is the extent to which the docking facilities and storage space extend) is 2,340 linear feet. The north and south sides are similarly constructed with open docks and storage space beyond. In physical structure both sides are equally well adapted to docking purposes. But the north side is unfavorably located in that it is exposed to heavy storms from the northeast which frequently make the landing of boats impossible on that side. For this reason the westernmost two-thirds of the north side have never been used by any steam-

ship company for docking purposes. The eastern one-third of said side is somewhat more sheltered by breakwaters and has been used by freight boats which are better adapted to stand the rough weather and which are not put to so great an inconvenience by a delay of twelve hours more or less in unloading, as are passenger boats. The statements are somewhat conflicting, as to the frequency of these storms. Mr. Thorpe, the general manager of the Goodrich Transit Lines, stated that these storms occur so frequently that it would be a waste of money for any steamship company to lease the north side of the pier, and that when the storms do occur it is impossible to dock boats there. Mr. Myering of the Graham Morton Company reiterated the same statement. Mr. Hugo Krause, the superintendent of the Municipal Pier, also concurs in this statement. No storms have ever occurred, to his knowledge, however, which have incapacitated the south side of the pier.

At the present time the north side of the pier is occupied as follows: The first 1,660 feet starting from the shore end of the pier is vacant and has never been used for the reasons above stated. The following 500 linear feet is occupied by Slater's Storage Co. and freight boats dock there. The business done by this company is that of transporting new automobiles. The next 140 linear feet is used by the City as a storeroom. The following 40 linear feet is used by the concessionaires on the pier as a storeroom. Following that is the recreation end of the pier.

It should also be noted that since the street cars have been moved to the ground level of the pier, the tracks are so placed as to run contiguous to the north and south sheds on the eastern end of the pier for about 400 linear feet. The result of this is that trucks and vans cannot be drawn up against the sheds at this space so that it is impossible to carry away and load freight. To summarize these observations, then, the pier is equal on both sides as to its facilities for storage, but, on two-thirds of the north side boats cannot dock and on a portion of either side, 400 linear feet

in length, goods cannot be loaded and carried away. Therefore, these portions should be excluded in estimating the "capacity" of the pier.

Basing our opinion upon the foregoing facts, it is concluded that the "capacity" of the pier should be determined as follows: All of the south side of the pier exclusive of the recreation end and exclusive of the 400 feet next west from that end (which is incapacitated by street car tracks) and which amounts to 2,340 minus 400 or 1,940 linear feet; from the north side of the pier should be excluded the westernmost 1,660 linear feet (excluded by storms), the recreation end of the pier and the 400 feet just west of the recreation end (excluded by car tracks) and which amounts to 2,340 minus 1,660 minus 400 or 280 linear feet. Therefore, the total capacity of the pier for purposes of transportation is 1,940 plus 280 or 2,220 linear feet. (It may be observed that since the sheds for storing goods, adjacent to the docks on either side of the pier, are 100 feet in width, these lengths above set forth in linear feet, may be transformed into square feet of floor space, simply by multiplying by 100.)

Having computed the total capacity of the pier, namely, 2,220 linear feet, it can readily be seen that the lease to the Chicago Steamship Lines directly violates the above quoted provisions of the statute as contained in the proviso to Section 3. That proviso requires that at least one-third of the capacity shall not be leased for a greater period than one year. This lease cannot come under that clause, for it is a five year lease. The statute next provides that not exceeding fifty per cent in capacity of the remaining two-thirds of the said capacity shall be leased to any one person or corporation. Fifty per cent of the remaining two-thirds of the total capacity of the pier as above computed would be 740 linear feet. This lease is for 1,400 linear feet. So it is obvious that this lease directly contravenes the statute and, for the reasons above stated, is therefore null and void.

In our opinion this lease is also invalid for the reasons that it is a contract made by a municipality to a private party

granting exclusive rights and therefore is a contract tending to create a monopoly; because it is against public policy; and because it permits action on the part of the lessee which is not contemplated and is impliedly forbidden by the Harbor Act.

An heritage which has come to us from the early common law is that contracts made by municipalities or other governmental agencies creating a monopoly in a private individual or corporation are void, unless such monopoly is a quasi-public corporation operated under the control and regulation of the City itself.

Of late years, the courts have enforced most rigidly this principle. Thus our Supreme Court in the case of *City of Chicago v. Rumpff*, 45 Ill. 90, at page 95, said:

“Municipal corporations are only created for the better government and protection of local communities in the enjoyment of their rights, than can be afforded by general laws. The powers which they are authorized to exercise, are delegated to them to afford more ample protection to the community in their rights and privileges. Such bodies are never created to enable them to confer pecuniary benefits, or to grant monopolies to any portion or community, or to individual members thereof. The creation of such bodies is convenient, if not essential, for the regulation of the local police; to adopt and enforce all needful sanitary regulations; to establish and control markets; to repair highways, and perform the various other duties necessary to promote the comfort and well being of such densely crowded communities as constitute large cities. But it is no part of the design, in organizing such bodies, that the corporate authorities shall enter into competition with its inhabitants in business or trade, or to sell, or even grant, special immunities to any portion of the inhabitants for their individual benefit or gain. The corporate authorities must exercise their franchises solely for the benefit of the community embraced within their limits. * * *

“All by-laws should be general in their operation, and should bear equally upon all of the inhabitants of the municipality. Where privileges are granted by an ordinance, they should be open to the enjoyment of all, upon the same terms and conditions. That the common

council had the right, under the large powers conferred by the charter, to so regulate the business of slaughtering animals, as to prohibit its exercise, except in a particular portion of the city, leaving all persons free to erect slaughtering houses, and to exercise the calling at the place designated, cannot be controverted. But an ordinance confining such a business to a small lot, or even a particular block of ground, is unreasonable, and tends to create a monopoly."

City of Bloomington v. Wahl, 46 Ill. 489, at 492.

Chi. & N. W. Ry. Co. v. People, 56 Ill. 365, at 383.

The Municipal Pier is a structure erected by the public at large and paid for by general taxation. The benefits arising therefrom should equitably inure to the use of all the people indiscriminately. To allow one favored individual to secure a practical monopoly of such a structure and to take advantage of such an opportunity by charging rents nearly double the rent he is paying is highly unconscionable. It is inequitable and opposed to public policy that any one individual or corporation should make an enormous profit out of a structure erected by and belonging to the people, and intended to benefit the people equally. In fact it was to guard against such very consequences that the legislature so wisely inserted the proviso to Section 3 of the Harbor Act.

It is obvious from a careful study of the said Section 3, that the legislature was attempting to guard against any one person acquiring a monopoly with the resultant opportunities of compelling high subrents from those less favorably situated. But to insure against discrimination among lessees, the last proviso to the said section was worded as follows:

"Provided, further, however, that no leases authorized under this act shall contain conditions which shall admit of any unjust, undue or unreasonable preference or discrimination between lessees."

This proviso clearly makes void any lease between the Chicago Steamship Lines Co. and a sublease calling for a greater rent than the lessee himself is paying. The whole spirit and

tenor of the statute, as well as the letter of the law, is violated by a sublease at a higher rent than the lease itself and the subsequent profit to the lessee to the detriment of the sublessee.

This lease is also void for the reason that it violates the last quoted proviso, in that it constitutes an unreasonable preference or discrimination between lessees. In the past the custom has always been to insert a provision in the leases on the Municipal Pier against subleasing by lessees, and almost all of the former leases contained this provision. At the present time all of the former leases have expired. On March 20, 1923, a new lease was made with the Slater Storage Company. That lease contained a provision against subleasing by the lessee without the consent of the Commissioner of Public Works. At the time that the lease with the Chicago Steamship Lines was executed, the Slater Storage Company lease was the only other lease then subsisting. The fact that the Chicago Steamship Lines lease does not contain a prohibition against subleasing, constitutes an unjust preference and discrimination against the other lessee on the pier, which is directly forbidden by the statute.

We are of the opinion that this lease is invalid for the further reason that the ordinance authorizing the lease constitutes an unlawful delegation of legislative power to the Commissioner of Public Works. Section 3 of the Harbor Act provides, in part, that "every such city and village shall have the power to lease portions of any of the utilities mentioned in Section 1 of this act for a period not longer than twenty (20) years *on such terms and conditions as shall be prescribed by ordinance.* * * *" The ordinance authorizing this lease, appearing on page 2351 of the Council Proceedings for April 5, 1923, is as follows:

"SECTION 1. That the Commissioner of Public Works be and is hereby authorized to enter into a lease on behalf of and in the name of the City of Chicago with the Chicago Steamship Lines, Inc., for the use of 140,000 square feet on the first floor of the south freight and passenger building on the Municipal Pier for a period of five years, at an annual rental of \$28,000.00.

SECTION 2. This ordinance shall take effect and be in force from and after its passage."

The lease as executed contains many terms and conditions not authorized by this ordinance. Therefore it is invalid, both because it violates the above-quoted section of the statute, and because it violates the common law rule that legislative power may not be delegated to or usurped by an administrative officer. We refer to the following cases:

Noel v. People, 187 Ill. 587.

Saddler v. People, 188 Ill. 243.

See v. O'Malley, 69 Misc. 215, 126 N. Y. S. 775.

Maxwell v. State, 40 Md. 273.

The mere fact that the City of Chicago is a party to the lease and even has accepted any benefits therefrom does not preclude or estop the City in anywise from asserting its invalidity. The Supreme Court of Illinois has enunciated this principle in the case of *Stevens v. St. Mary's Training School*, 144 Ill. 336, at page 354:

"A municipal corporation, which has entered into a void contract, cannot be estopped from taking advantage of its own incapacity when suit is brought upon such contract, or other efforts are made to secure its execution."

The following cases are also cited:

East St. Louis Gas Light Co. v. City of East St. Louis, 47 Ill. App. 411.

Trustees of Ill. Central Hospital v. City of Jacksonville, 61 Ill. App. 199.

City of Chicago v. Williams, 182 Ill. 135.

For the foregoing reasons, we beg to advise you that in the opinion of the Corporation Counsel, this lease is null and void and may be completely ignored. Any payments of rent offered under this lease should be refused by the City, and the Chicago Steamship Lines should be notified that the City considers this lease null and void and will so treat it. If, after a reasonable time, the said Chicago Steamship Lines refuses either to apply for a more reasonable lease of

the space which it intends actually to occupy, or to remove its goods and effects from the said pier, steps should be taken to evict the said company from the pier.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Bill to Give City Council and Its Committees Power to
Issue Subpoenas and Compel Production
of Books and Papers.**

April 30, 1923.

HON. JOHN H. LYLE, Chairman, Committee on Judiciary.

Dear Sir:

You submitted to us copy of a proposed bill giving the City Council and its Committees power to issue subpoenas and to compel the attendance of witnesses and the production of evidence on matters under investigation by any Committee.

You state that it is the wish of the Committee to approve the bill, and recommend its submission to the General Assembly if it is in proper form, and your only request appears to be to have the bill in proper form.

There are objections to the form of the bill, among which is the failure to place a title at its head, the incorrect enacting clause, the failure to divide in proper sections, the duplication of language in several places, etc.

These imperfections could be readily overcome, but in the opinion of the writer this proposed bill goes much further than the constitution permits. It really places into the hands of the Council and a large number of members inquisi-

torial and judicial powers of an extraordinary character. The authority to imprison is greater than the courts themselves exercise.

At the request of the Finance Committee some time ago we prepared a bill which gave to this Committee limited authority along this line. This bill is now pending as House Bill No. 649. We send a copy of same herewith for your information. The bill is probably printed by this time, and the writer will send up several copies to you in time for use before the Council Meeting on May 2d.

The theory under which we believed there was a chance to sustain such an act in the case of the Finance Committee was that it actually had some authority of a judicial nature in the adjustment of accounts. There is grave doubt, however, whether we have kept within bounds in the case of this bill. If, after studying what we have prepared, and what we say in this letter, you still want a bill drafted along the lines that you suggest, we will do the best we can to draw one.

The objections that we state above, in detail, are as follows:

The power to compel witnesses to appear is given broadly to the City Council and any Committee of the Council appointed by the Mayor, or created by ordinance. This does not definitely limit the power at all, but is a general blanket provision which extends powers that are lodged in the legislature only at the present time, so that the City Council could exercise them without limit. The provision for giving the presiding officer of the Council, and the Chairman, or any member of any Committee the power to administer oaths is also very broad, when taken in connection with the provision later on authorizing the infliction of pains or penalties of perjury in cases of false statements made before a committee.

The inquisitorial powers given to the Committee in so far as they authorize a Committee to compel a witness to testify against himself are greater than those accorded to the grand jury at the present time.

Again, the authority to issue warrants in case a person refuses to appear is not safeguarded as in the case of criminal warrants.

The provision requiring persons to appear and to produce papers and documents, under penalty of \$3 to \$100, does not specify how such a judgment may be entered and executed, and its effect is rendered nugatory by the provision that such punishment shall not be construed to affect the right of the City Council or any Committee to compel the attendance of such person as a witness or to punish him for disorderly or contemptuous behavior. This would amount to a double penalty.

Following that provision, you have one in the proposed bill which states that the City Council, or any Committee shall have the right to punish by imprisonment in the county jail, any person refusing to testify or to produce books and papers, and the manner of executing this is that a warrant under the hand of the presiding officer of the Council, or of the Committee, countersigned by the Secretary or Clerk, may be directed to the Sergeant-at-Arms or to the Bailiff of the Municipal Court, or to his deputies, or to the Chief of Police, commanding such officer to commit the person to the county jail and to deliver him to the keepers thereof, and the jailer is to receive him in custody and to keep him for the time for which he is committed or until he is duly discharged.

Such powers are not at the present time lodged in the courts, and are distinctly contrary to the constitution.

In addition to this, if the person is committed for refusal to answer a question, the warrant may direct that the person be returned to the Council or to the Committee, within twenty-four (24) hours from the time of committal, or it may direct that he be imprisoned until he shall signify his willingness to obey the requirements of the City Council or the Committee. These provisions are also contrary to the constitution.

In fact, the proposed bill so far out-runs the ordinary delegation of power in matters of this kind, that before we

can intelligently take up the question of a bill to prepare for you, we would have to have a conference with you or your Committee, so as to give us some idea of how far you will go, in view of the objections that we have stated.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS N. FUSCH,
Corporation Counsel.

Decision of Supreme Court on Taxes of Insurance Companies.

April 30, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In response to a request sent to us some time ago for an interpretation and an explanation of the significance of the recent decision of the Supreme Court of Illinois in the case of *People ex rel. City of Chicago v. Charles V. Barrett et al.*, acting as the Board of Review, we submit the following:

The decision is of the highest importance to the City. It will result in the collection of large sums of money in taxes that have been evaded, if the Supreme Court will stand by its first opinion. It is problematical whether it will do so because it has granted a rehearing. The litigation was conducted by special counsel named by the Corporation Counsel and approved by the City Council. It was originated by the recommendation of this department and carried on under the supervision of and in the name of the Corporation Counsel.

There is involved in the decision referred to and in the decision rendered by the same court in *People ex rel. City of Chicago v. Kent*, 300 Ill. 324, decided on December 22, 1921, the whole subject of taxation of foreign insurance companies other than life. In order that this may be presented to you in such form that you will readily understand it an explanation of the situation with regard to such taxation will be necessary.

Under the provisions of the general revenue laws relating to the levy and collection of a uniform *ad valorem* tax on all property there would be only a comparatively small amount of money collected from foreign insurance companies, associations and joint stock companies, some of which do business of great magnitude in this state. While there is special provision in the Revenue Act for the scheduling of insurance companies, the property of these concerns is not located here, and, the situs being elsewhere, it cannot be reached by the taxing authorities of this state. Hence, if there were no other way of obtaining a tax from them, the return which these companies would have made as of April first each year would have represented only the cash on hand in the general agency located here in addition to the office furniture, stationery, etc.

To overcome this situation there were other means used at a very early date and continued right down to the present time to secure a more substantial revenue from these institutions. If the laws enacted for this purpose had been correctly interpreted and rigidly enforced, a very large amount of revenue which has not been paid in would have been recovered.

Among the acts designed to secure revenue from these sources is the one which provides for a tax of two per cent on the gross receipts of foreign fire insurance companies for the use and benefit of the fire department. We mention this because this is indirectly affected by the two decisions referred to, which point the way for a more specific accounting than has ever before been attempted, and which makes pos-

sible the recovery of a great deal of revenue due to the City from such companies.

Another provision of the statutes designed to obtain revenue from foreign insurance companies is Section 30 of the Fire, Marine and Inland Navigation Insurance Act of 1869, as amended in 1879. This is the provision that is directly involved in the opinion we are discussing. The section reads as follows:

“Section 30. Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts, of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—State, county, town and municipal—that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed; *Provided*, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent, in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city.”

When the original Section 30 was enacted in 1869 it was clearly intended to be applicable only to fire, marine and inland navigation companies, as the title of the act indicated. When the section was amended in 1879 it still retained its position in the act relating to these particular classes of insurance companies, and necessarily it would have applied to only such companies if the legislature had not at the same time passed two other acts which made the provision applicable to all other insurance companies except life insurance companies.

The title of one of the other acts just referred to is sufficient to indicate that its purpose was to bring all other for-

eign companies except life insurance companies within the provisions of Section 30 quoted above. The title reads:

“An act to compel all insurance companies of other States and countries, doing any kind of insurance business in this State, other than life, to comply with the general fire and marine insurance laws of this State, and to require deposits of plate glass, accident and steam boiler insurance companies.”

The third act which was passed in 1879 was entitled, “An Act for the better regulation of the business of insurance,” and of this the court say, in the opinion before us, that it “was passed for the express purpose of fixing the condition upon which foreign insurance companies may come in to this State and do business.”

It was contended by the insurance companies that the provisions of Section 30 applied only to fire, marine and inland navigation insurance companies; that the amount reported by such companies was to be regarded in the light of a personal property return, to be made without an exact computation but in the loose way that personal property returns are usually made; that the amount to be returned was the amount of net receipts on hand April 1st; that the amount thus returned was subject to the reduction and scaling incident to equalization; that the amount finally fixed was to be regarded as the full valuation and further subject to cutting down to one-half—formerly one-third and one-fifth—to the so-called “assessed value”; and there were other points insisted upon.

The court, in the *Kent* decision, of which we speak above, held that the Board of Review had the power to compel the representatives of foreign insurance companies to make a return on a form such as was prescribed by the State Tax Commission; that the tax provided by Section 30 was a tax on the business and not an *ad valorem* personal property tax; that it was based on the net receipts of the year and not on the net receipts on hand April 1st; that the return must be precise and is not subject to reduction or scaling or division so as to reduce it to the basis of “assessed value.”

Such was the decision in the *Kent* case, which gave the City every point contended for, but which did not pass on the vital question of whether or not the provisions of Section 30 apply to companies other than fire, marine and inland navigation insurance companies.

What the issue was in the *Barrett* case which we are now explaining is stated by the court in the opinion in the following language:

“The legal question thus presented for decision is as to what foreign insurance companies are subject to the taxes under said section, and particularly whether or not Lloyds associations, casualty companies, companies doing a re-insurance business, companies insuring automobiles and other vehicles, against risk of fire, lightning, windstorm, tornado, cyclone, explosion, hail storm, transportation by land or by water, theft and collision, and other individual and specifically named insurance companies, are so subject.”

In passing on the questions before it the court, following the classification in the petition of the relator, thus classified the companies involved where there was no showing made that they were incorporated:

These companies are classified and grouped under the following heads: (1) Joint stock companies of other states; (2) joint stock companies of foreign governments; (3) mutual companies of other states; (4) foreign Lloyds; (5) American Lloyds; and (6) casualty companies of other states.

The court holds that the provisions of Section 30 apply to all other kinds of insurance companies as well as fire, marine and inland navigation companies and that all such corporations of foreign countries and other states (except life companies) are subject to its provisions, but finds that there are constitutional obstacles which prevent its enforcement in the case of unincorporated companies against (1) joint stock companies of other states, (3) mutual companies of other states, and (5) American Lloyds. The provision, however, holds good as against (2) joint stock companies of foreign governments, (4) foreign Lloyds, (6) casualty companies of other states.

The two decisions are very sweeping and far-reaching. They will enable the City to collect much on its fire department tax that has been evaded, will place the income from that on a more stable basis, and insure a larger return in the future. As to the back taxes that are recoverable through the county taxing authorities by the enforcement of Section 30, it is impossible to form an estimate, but the amounts should run into the millions, possibly even as high as five or six millions.

There is one peculiar feature of the situation that should be noted. That is the attitude of the Board of Review. The action being against the Board of Review, it had the right under the law to petition for rehearing. It did not do this, however, and allowed the time for making application to go by. After the time had gone by it permitted the use of its name to the attorneys for some of the insurance companies affected, who served notice on the City on July 15th that they would "make application for an extension of time in which to give notice of our intention to apply for a petition for rehearing," etc. A 240-page brief was filed by Cooke, Sullivan & Ricks; Ryan, Condon & Livingston; McCormick, Kirkland, Patterson & Fleming and Schuyler & Weinfeld. The court has granted a rehearing and the case stands thereon at the present time.

We suggest to you that the position of the Board of Review appears to us to be rather anomalous in trying to defeat the securing of a larger amount of revenue, and it may perhaps be advisable to take this phase of the case up with the Board of Review.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Repeal of One O'Clock Closing Law for Cabarets.

May 1, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

The only section of any ordinance providing for one o'clock closing of places of public amusement was Section 5 of what was known as the Cabaret Ordinance passed August 14, 1918.

On the 28th day of December, 1921, an amendment to said ordinance was passed, and in Section 4 of said amendment it is provided as follows, to wit:

“That Section 5 of an ordinance licensing and regulating public places of amusement passed by the City Council on August 14, 1918 (page 961 of the Journal of the Proceedings of the City Council of said date), be and the same is hereby repealed.”

It is, therefore, our opinion that under the law there is no valid existing municipal ordinance which justifies one o'clock closing of places of public amusement within the City of Chicago.

Yours very truly,

LEONARD J. GROSSMAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. PUSCH,
Corporation Counsel.

**Revocation of License for Place of Amusement Prior
to Judicial Determination That the Place is
Improperly Conducted or Immoral.**

May 1, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

With reference to your inquiry concerning the extent of your authority to recommend, and the Mayor to revoke, licenses of places of amusement before convictions in said places have been obtained, it is our opinion that the licensee is estopped from claiming that the City is without power to revoke without judicial sentence by accepting and acting under a license containing the power of revocation.

Section 206 of the ordinance applicable to amusement places provides that before a place at which it is desired to conduct, produce, operate or offer a public place of amusement can be licensed, it must be first determined if such is a fit or proper place operated or conducted in accordance with the ordinances of the City governing and controlling such places, or if the amusement or entertainment desired to be produced or offered be of immoral character, or if the person making application for a license be not of good moral character the Mayor may refuse such application and no license shall be issued by the City Clerk except upon the approval of the Mayor.

Section 210 of said ordinance provides that the Mayor is expressly authorized in case any firm, person or corporation licensed under the terms of this ordinance shall violate any of the provisions of this article or any of the general ordinances of the City of Chicago or laws of the State of Illinois,

relating to the conduct of such places or upon the request of the Superintendent of Police, or of the City Council in case he or it shall find that such place of amusement is improperly conducted to revoke any such license issued hereunder.

There is, therefore, no doubt as to the authority to revoke the license of such place of amusement if it is improperly conducted, or if it is of an immoral or dangerous character.

Yours very truly,

LEONARD J. GROSSMAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Authority of City Through the Public Vehicle License
Commission to License Buses Running
Upon "Fixed Routes."**

May 1, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police

Dear Sir:

Replying to your request for advice as to what action your Department should take relative to permitting the Suburban Transportation Company to operate bus lines in the City, we respectfully submit the following:

Section 3915 of The Chicago Municipal Code of 1922 provides for a Public Vehicle License Commission, consisting of:

- 1) The Deputy Superintendent of Police, Chairman,

2) The Examiner of Public Motor Vehicle operators;
and

3) The Officer in charge of the vehicle bureau of the department of police, Secretary.

Section 3917 of the Code then provides:

“No public vehicle shall operate for hire upon the streets of the city without first obtaining a license as herein provided for.”

Section 3929, however, contains the following proviso:

“Provided, however, that no part of this article shall apply to or govern any * * * omnibus running by authority of ordinance, law, charter or permit upon a fixed route through the city.”

It is clear that the buses in question contemplate running upon “fixed routes,” and it is well settled that, for that very reason, they come within the regulatory power of the Illinois Commerce Commission.

Public Utilities Commission v. Bus Line, 290 Ill. 574.

Jacksonville Railway Co. v. O'Donnell, P. U. R. 1915C, 853.

Georgia R. & P. Co. v. Jitney Bus Co., P. U. R. 1915C, 928.

Re Auto Stage Lines, P. U. R. 1915C, 945.

But the fact that the Illinois Commerce Commission may grant to such company a “certificate of convenience and necessity,” does not, in our opinion, deprive the City of its licensing power over the same. The Motor Vehicle Law (Section 26) expressly reserves to municipal corporations the power to “enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles used within their limits for public hire.” And while the Public Utilities Act authorizes the Illinois Commerce Commission to have “general supervision” over public utilities (including transportation companies running upon fixed routes) it does not expressly say that such supervision shall be “exclusive.” Furthermore it does not provide for the payment by such

motor bus company, of any compensation to the State for such certificate of convenience and necessity, which the statute undoubtedly would have done if the intention had been thereby to relieve such motor bus company from the payment of the license fees to the municipality in which it operates, that other public vehicles, not operating along fixed routes, are required to pay.

The City having therefore the right to charge some sort of a license fee, the only question to be determined seems to be how such power should be exercised,—whether in the form of an ordinary license fee, as required from taxicab owners, or a “compensation fee,” or franchise tax, as required from street railway companies. It appears that the City Council, in passing Section 3929 of the Code aforesaid, had in mind that possibly it might, sometime in the future, demand a franchise tax from such motor bus companies, and that, *in case it did so*, the public vehicle license commission should be relieved of jurisdiction over said companies.

The City Council has not, as yet, at least, passed any ordinances requiring any franchise tax or “compensation” from such motor bus companies. In our opinion, therefore, they are not excepted from the jurisdiction of the public vehicle license commission. Nor do we believe that it was the intention of the City Council that a mere certificate from the Illinois Commerce Commission should be sufficient to bring them within the exception of Section 3929 aforesaid, since such certificate does not, in our opinion, constitute either a “charter” or a “permit,” within the meaning of said section.

We understand that the City Council has for several years been considering the question of requiring from such motor bus companies a franchise tax or compensation for the use of the streets, but has as yet come to no conclusion. Its right to do so has been seriously questioned by the representatives of the company on the ground that they are not seeking any special privileges, such as placing tracks, poles, wires, etc., in the streets, and therefore need no franchise

from the City, but that they are exercising merely the common right of travel upon the streets, which is free to all, under like conditions.

That there is a serious question as to the City's power in this regard, cannot be doubted. Thus our Supreme Court said, in the case of *City of Chicago v. Collins*, 175 Ill. 445:

"The right to travel on and along the streets of a city belongs to the general public, and does not belong to its denizens alone. * * * Any usual mode of travel along the streets and alleys of a city cannot be declared to be a nuisance. * * * The city may regulate certain occupations such as hackmen, draymen, expressmen, and the like, for such regulation is of a police character, having reference to the general welfare, as a means of preventing improper exactions and extortions; and for the same reason a license may be exacted for vehicles used in the transportation of goods and merchandise, or of passengers, or for other purposes of traffic; *but such license is an occupation license, and not one for the use of streets.*"

In the case of *Jitney Bus Ass'n v. Wilkes-Barre*, 256 Pa. 462, the Supreme Court of Pennsylvania said:

"As to the right of the municipality to regulate, in the interest of the public safety, the running of jitneys, as well as other traffic upon the public streets, we have no doubt. The only question in such case is whether the requirements of an ordinance for that purpose are reasonable, and not unduly burdensome. Regulation is not to be carried to the extent of prohibition. A jitney is an automobile, and by universal custom automobiles are permitted to use the streets of cities, as are other vehicles. The fact that the owners of jitneys derive a profit from their operation, makes no difference in their legal status. Much of the traffic upon the city streets is a matter of profit, directly or indirectly, to those engaged therein. The public highways are for the use of those engaged in commerce or industrial pursuits, no less than for pleasure cars."

However, we do not deem it necessary to extend the discussion of this point any further. For whatever power the City Council may have to exclude motor bus companies from

the city streets unless they shall first apply for and secure a franchise from the City, the fact is that the City Council has not as yet attempted to exercise any such power, but has, by its ordinances, left such companies under the jurisdiction of the Public Vehicle License Commission.

For the reasons above stated, we are of the opinion, that under the present status of the law and the ordinances, the Public Vehicle License Commission, of your department, is authorized to issue licenses for the buses of the Suburban Transportation Company, in substantially the same manner that it is authorized to issue, and has been in the habit of issuing, licenses to the owners of taxicabs and similar public vehicles.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Authority of City to License Buses Running From the State of Indiana to Points Within the City.

May 2, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In reply to your request for an opinion relative to whether certain motor buses operating from the vicinity of 63d street and South Park avenue to towns in Indiana (and thus en-

gaged in interstate commerce), have any right to operate without first obtaining a license from the City of Chicago, and what policy your department should pursue in regard to the same, we beg to state that the buses in question are under the same obligations and restrictions as buses operating wholly within the City of Chicago, and should accordingly be treated by your department in the same manner.

While the Federal Constitution has given to Congress the power to regulate interstate commerce, Congress has not as yet passed any act for the regulation of motor buses so engaged. Until Congress does act in that behalf, the several states have full right to adopt any reasonable regulations they may deem appropriate.

In the case of *Hendricks v. Maryland*, 235 U. S. 610, the Supreme Court of the United States said:

“In the absence of national legislation covering the subject, a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of *all* motor vehicles—*those moving in interstate commerce as well as others*. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce.”

We note the suggestion of Captain McMahon, Commanding Officer of the 5th District, that no further action be taken by the police until certain contemplated court proceedings by the Attorney General have been disposed of. Since, however, the Attorney General can only sue for the license fees due the State and for penalties for violation of State laws, and has nothing to do with license fees due the City or penalties due for violation of city ordinances, we do

not believe that the City has anything to gain by waiting for the State to make the first move.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Suspension of Civil Service Employe for Greater Period
Than Thirty Days Forbidden by Law.**

May 2, 1923.

HON. ARTHUR R. SEYFERLICH, Fire Marshal.

Dear Sir:

Answering yours of the 30th ult., *in re* reinstatement of William H. Green, Fireman 1st Class, Engine Co. No. 108, and Otto Novotny, Fireman 1st Class, H. & L. Co. No. 15, beg to say that in my opinion these men should be immediately reinstated, Green as of April 23, 1923, and Novotny as of today.

My opinion in this respect is based upon Section 12 of the Civil Service Law which authorizes the head of any department to suspend an employe for a reasonable period not exceeding thirty days, and a suspension of these men for a longer period is, in my opinion, contrary to this law.

I have sent a copy of this opinion to the President of the Civil Service Commission, Mr. Finn.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Illinois Merchants Trust Company as a City Depository After Merger.

May 2, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You ask to be informed as to the legal status of the Illinois Merchants Trust Company as a City depository.

It appears that prior to January 1st the Illinois Trust and Savings Bank and the Merchants Loan and Trust Company both were named as City depositories for the current year; and since the beginning of the year the two banks have consolidated, and the consolidated bank is now known as the Illinois Merchants Trust Company. It is our impression that, although the banks were consolidated, they retained their identity as separate corporations. If that is the case there will be no occasion whatever for disturbing the situation, and deposits can be made in the Illinois Merchants Trust Company's bank in the name of either of the banks which have been merged. If, however, there has been a merger which wipes out the former organizations or has the effect of creating the new banking organization that is now assuming to act as a depository, we would recommend that new bonds be procured from the new organization. We regard the fact that both of the banks were named as depositories as sufficient to warrant us in treating the consolidated bank as a depository.

We call your attention to an opinion rendered as of the same date concerning the Stony Island State Savings Bank, in which we speak at length in regard to the status of a newly organized bank, and draw the distinction that we are making as between the two.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Depository of City Funds Reorganized Under Different Name.

May 3, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your letters concerning the status of the Stony Island State Savings Bank, to which is attached also copy of a letter you received from Mr. Charles S. Deneen, attorney for the bank. From these we gather the following facts:

The Stony Island Trust & Savings Bank was named as a City depository for the year 1923 prior to January 1, 1923. It presented its bid and filed its bond in the sum of \$125,000, which was duly approved by the City Council, all in apt time, as required by statute and by the ordinances of the City. The City had \$40,000 on deposit at said bank on February 26th, at which time a reorganization took place. A new banking corporation was formed under the name of Stony Island State Savings Bank, which took over all the assets of the other corporation and assumed all the liabilities except the liability, if any, of the Stony Island Trust & Savings Bank to its shareholders. The directors of the new institution remain the same as in the old institution except the president. There is a new president, and to that extent only the officers and directors are different.

The question presented is whether the Stony Island State Savings Bank is a City depository. In Mr. Deneen's letter, he merely asks whether it will be required to execute a new bond. But we believe the more important question is its status as a depository.

Changes of this kind seem to be of frequent occurrence among City depositories. Each case must be determined ac-

cording to the circumstances connected with it. The Law Department has sought to be consistent in deciding the questions as they have arisen. Under the state of facts presented in the case of the First Englewood State Bank, we held that the bank had to be regarded as a new bank because the president in his letters spoke of it as a "new bank" and a "new organization," and therefore that it could not be regarded as one of the City depositaries. But in our opinion we said: •

"The only reason why we are in a slight degree of doubt is because the officers of the bank seem to be going on the assumption that the institution is the same, and the words of the president may have been overstating the facts. That is to say, such a thing as a reorganization is possible without a loss of identity, and it is possible even to change the name of such a corporation without taking out a new charter. However, since we have nothing before us which indicates that the situation has been misstated, we must advise you that the new bank is not a City depositary." (Opinions of Corporation Counsel, from January, 1920, to April 15, 1923, pp. 455-456.)

The statute under which depositaries are named requires that bids shall be received from all "regularly established" national and state banks and reported to the City Council not later than December 15th, "to the end that an award or awards may be made upon such bids by the City Council prior to the end of each fiscal year." (Sec. 5, Part 2, Article XII, Cities and Villages Act.) Supplementing the statute, Section 28 of The Chicago Municipal Code of 1922 provides that "a regularly established national or state bank is hereby defined to mean a bank which has been doing business in the City of Chicago and has furnished at least one sworn statement of resources and liabilities to the state auditor or to the comptroller of the currency prior to the date upon which the bids provided for herein are to be submitted."

Such being the case, there is no doubt that technically an institution which only begins business after the fiscal year commenced is not qualified, and it cannot be regarded in law as the same institution which has been named as a

depository. How strictly this technical rule should be adhered to depends, as suggested above, on whether the bank has lost its identity in the reorganization.

It is not hard to conceive of a change of even so radical a nature as a shift from a state to a national charter, or vice versa, or a consolidation or merger, as not affecting the organization materially. If the same personnel, the same capital, the same banking offices, etc., remain, there may be no occasion for regarding the institution as changed. On the other hand, a change in the capitalization or a change in name may be material.

These things may be regarded as fine-spun distinctions for which there is no real basis. But there is as much reason for making such distinctions as there is in making a change in the organization. In the present instance, there is state organization which remains a state organization with so slight a change in name that the average depositor will hardly recognize the difference. If there is in fact no change why was this change made? We are not convinced that in this case there was preserved that identity of organization which would warrant us in saying that the newly organized bank can be regarded as the City depository named last December.

It may be entirely safe to leave the City's money there, although we advise the taking of a new bond in that case. If the money is left there, the bank does not come within the definition of a depository and the City's officers must be responsible for its safety.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Authority of the Sanitary District to Build an Approach
to a Bridge by a Viaduct Over Railroad Tracks, or
to Condemn Land for a Grade Crossing or to
Compel the Railroad to Elevate Its Tracks
and Build a Subway.**

May 3, 1923.

HON. JOSEPH O. KOSTNER, Alderman of the 23d Ward.

Dear Sir:

We are in receipt of your verbal request for a supplementary opinion relative to the matter of the proposed Crawford avenue bridge, concerning which an opinion was recently given you. We understand that you now wish to know whether the Sanitary District, in case it builds the bridge in question, can, without further authorization from the legislature, build as an approach to such bridge, a viaduct over the tracks of the Santa Fe and the Chicago & Alton Railways (located on private property), or, as alternative plans, condemn land for a street to cross such tracks at grade, or force the railroad companies to elevate their tracks at that point, and build a subway under the same, so that the public may have complete access to such bridge both from the north and the south ends thereof. At present, we understand, Crawford avenue, on the north side of the premises in question, stops at the north line of the Drainage Canal property, and on the south side it stops at the south line of the C. & A. R. R. right of way.

The Sanitary District can exercise only such powers as have been expressly or impliedly conferred upon it by the legislature.

Sanitary Dist. of Chicago v. C. & A. R. R. Co., 267
Ill. 252.

Now, the Sanitary District Act, Section 17, does require the District to build the bridge in question "with suitable

approaches thereto," but we note from an opinion rendered a few years ago by the attorney for the Sanitary District, a copy of which you showed us, that said District takes the position that this does not authorize the Sanitary District to go beyond the limits of its own property, or to build viaducts over private property, or the right of way of any railroad or other public utility, in order to make the access to the bridge more convenient. This view may be correct, although we are inclined to the opinion that the following language in Section 17 of the Sanitary District Act is broad enough to give the desired authority:

"When it shall be necessary in making any improvements which any district is authorized by this act to make, to enter upon any public property or property held for public use, such District shall have the power to do so and may acquire the necessary right of way over such property held for public use in the same manner as is above provided for acquiring private property."

However, since the Sanitary District officials seem to entertain some doubt as to their authority in the matter, it would perhaps not be a wise policy to delay the improvement by any unprofitable discussion with them as to the precise meaning of the statute. The easiest way out of the difficulty would, in our opinion, be to secure from the legislature an amendment to the statute defining the powers of the Sanitary District in that regard in more specific terms. We shall be pleased to prepare such an amendment, if you deem it desirable.

We return herewith the copy of the opinion above referred to.

Yours very truly,

CARL J. APPELL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Necessity of Complying With Writ of Mandamus When
Appeal Has Not Been Prayed—Effect of Granting
of Supersedeas after Writ Has Been Served.**

May 4, 1923.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

In response to your request to be informed as to the present status of the case of *Malloy v. Frazier and others*, and the possibility of obtaining a stay order therein, we submit the following:

A petition for mandamus was filed by Malloy in the Circuit Court. He named the civil service commissioners and the superintendent of police as respondents and prayed for reinstatement as captain of police. Judgment in the case was entered by Judge Wilson on March 21, 1923. This judgment consisted of two parts, a finding in favor of the petitioner and a peremptory order restoring him to his former position. No appeal was prayed or allowed, and the term of court in which the order was entered has passed. There is, therefore, no appeal possible, and the order is now in effect and will remain in effect unless a supersedeas is secured from the Appellate Court. Review is possible only by writ of error.

No supersedeas can be obtained until the record of the trial court is filed in the reviewing court.

Blackerby v. People, 10 Ill. 266.

Certified copies of the final order of the court have been served on the officers involved. It is incumbent on them to obey this order of court, otherwise they will be in contempt of court. The service of such certified copy is in legal effect the same as the service of the writ of mandamus ordered by the court.

If a supersedeas should later be applied for and granted, the effect of the same will be to stay the execution of the writ in so far as it has not yet been carried into effect, but so far as executed it will have to remain executed until there is a judgment of the reviewing court reversing the Circuit Court.

“A supersedeas to a judgment awarding a peremptory writ of mandamus which has not been performed stays the execution of the writ, but does not undo previous full performance thereof.”

Polk County Commrs. v. Johnson, 21 Fla. 577.

To the same general effect are the following cases:

Boise County v. Gorman, 19 Wall. 661.

Atchison v. Lucas, 7 Ky. Law Rep. 424.

People v. Steele, 1 Edm. Sel. Cas. 505 (N. Y. 1848).

Tyler v. Hammersley, 44 Conn. 393.

The only remaining question is what part of the order, if any, can be stayed by supersedeas.

The order of court first commands the Civil Service Commission forthwith to annul, vacate and set aside its finding and decision and to reinstate the relator. This will have to be done, and in our opinion it cannot be undone unless and until there is a reversal of the judgment of the Circuit Court.

The order next commands the Superintendent of Police forthwith to re-assign the relator to his duties as captain of police. This will also have to be done, but as this is a continuing duty we believe that a supersedeas, if granted, would have the effect of permitting the Superintendent of Police to withdraw the relator from the service pending the disposition of the case on review. Whether it would have the effect of permitting a discontinuance of his salary is problematical, and we would not recommend that course.

The last clause of the order requires each of the respondents to “forthwith do all and several such other acts as are necessary to fully carry into effect this order.” Since the writ must command the doing of specific things, such an order as is contained in this last clause is of no legal effect.

The above covers such matters as are likely to arise at the present in the case in question.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Protection of City's Claims for Delinquent Special
Assessments When Foreclosure
Proceedings Are Brought.**

May 4, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You presented to us a list of descriptions involved in the suit of *People v. Keller*, wherein parties have by foreclosure proceedings obtained certain property that was sold for delinquent taxes without paying the City its claims on special assessments.

We note that these amounts are small, although in one case the City's claim is greater than the entire amount to be paid for redemption. The period of redemption will expire on the 11th of May, and you ask that all necessary steps be taken to protect the City's claims under Section 224 of the Revenue Act.

What you are really asking is whether or not you should redeem the property and thus defeat the purpose of the persons who have by this method of foreclosure wiped out the City's claims against the property.

This is in all instances purely a question of policy. In the present instance the amounts involved are not of suffi-

cient size to make it worth while for the City to go to any extraordinary length in redeeming the property and preserving its claims. Nevertheless, if the property is being cleared of claims by the professional tax buyers or purchasers of delinquent property who make a practice of cutting out the City from its rights in this way, it would be well to redeem in order to prevent such action being taken in the future, on the assumption that it is easy to defeat the City's claims.

As stated to the City's real estate agent by the writer, the above is practically the only recommendation we have to make and we understand that it is sufficient for the purposes of the three items to which you call our attention.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Powers of City Council Relating to Appropriations—
Power to Increase Salaries of Officers and
Employes During Term of Office or
Employment—Additional Appropriations and Transferring
of Appropriations.**

May 5, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter of recent date in which you ask a number of questions concerning changes of salary, the powers and limitations of the City Council, and the altering of any financial policy after the passage of the annual appropriation bill.

This department has, on numerous occasions, undertaken to explain the theory under which it has acquiesced in changes in salary after the passage of the appropriation bill, but in all opinions rendered on this subject it has taken care to avoid saying that there is any direct or clear authority for doing so.

The constitution draws a distinction between an office and an employment, as follows:

“An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished.” (Art. V, Sec. 24.)

The Constitution provides that the salary of an officer cannot be changed at any time during his term. The language employed is as follows:

“The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term.” (Art. IX, Sec. 11.)

In pursuance of the above provisions of the Constitution the General Assembly passed the following, which appears in the Cities and Villages Act:

“All other officers (other than Mayor) may receive a salary, fees or other compensation to be fixed by ordinance, and after the same has been once fixed, such fees or compensation shall not be increased or diminished, to take effect during the term for which any such officer was elected or appointed.” (Art. VI, Sec. 15.)

Later on, after the passage of the so-called Chicago Charter Amendment to the Constitution, there was passed and duly adopted thereunder a provision relating solely to the City of Chicago, which reads as follows:

“The compensation of all officers shall be by salary, as fixed in the annual appropriation bill, by the City Council, and the compensation of no officer shall be al-

tered during the same fiscal year." (Art. XII, Part Two, Sec. 3.)

In construing this last clause the apparent inconsistency with former provisions relating to the salaries of officers may be overcome by pointing out that the Charter Amendment permits the General Assembly to pass any law, local, special or general, providing a scheme for or amending the charter, for the territory embraced within the City of Chicago, even though it may conflict with other provisions of the constitution. In addition to this, the definition of officer may be read into the last clause which we have quoted.

By this rather specious method, the conclusion is reached that an officer may have his salary changed at the time of the passage of the annual appropriation bill. There has been no authoritative decision on this point, but the reasoning is at least plausible if not entirely sound.

Having reached this point it is only one step farther to apply the distinction pointed out concerning the definition of employment and to hold that the mention of officers implies the exclusion of employes. Hence, if there is no other inhibition against raising salaries of employes after the passage of the annual appropriation bill, it can be done.

There is a section of the code which prescribes that "the salaries or compensation of all officers, clerks and employes of the City shall be determined and fixed by the City Council in the annual appropriation bill." (Sec. 2808.) But this section does not specifically prohibit the changing of salaries, and there are other sections which seem to indicate that it was the intention of the City Council to retain control over such salaries. Hence, if the change is made by ordinance, or in other words, a legislative enactment of equal dignity, the salary fixed in the annual appropriation bill may be altered.

The only reason why we express some doubt as to the soundness of the position outlined above is because our courts have sometimes defined the word "officer" as broad enough to include an employe. If that definition were to be ac-

cepted the theory under which we have held that salaries of employes may be altered would fail. Acting along the line of reasoning above set forth, however, we have for years held that it was lawful to alter salaries of employes after the passage of the appropriation bill.

The right to make increases in salary being conceded, there is no precise manner of making changes of this kind to which the City Council must conform, provided it remains within the general provisions and within the spirit of the Civil Service Law. If the City Council determines in its wisdom that certain positions should be regarded, its action would stand unless there was a manifest abuse of discretion. Its acts along this line, as in all other legislative matters, must be reasonable, with the presumption of reasonableness in favor of the enactment until the contrary is shown.

In case a position is graded so that the duties of same are plainly outside of a proper classification or so that a much better grade of employes is put into it than is required for the work, as, for instance, if a position is graded so as to call for a principal clerk when a junior stenographer or junior clerk would be the proper kind of employe for the place, it could be attacked on the ground that there was a manifest violation of the spirit of the Civil Service Law. But such incongruity would have to be great before the action of the City Council could be upset.

The same general rule applies to the increase of salary attached to a group. If such a group as junior engineer was singled out of other groups in the same classification, an increase so as to take the salary out of the classification, without any corresponding action on the part of the Civil Service Commission, would probably be held invalid; but an increase so as to keep it within its proper classification, even if it disturbs the relative position it occupies with respect to other groups in the same class, would seem to be within the power of the City Council. If the City Council determines that a group is not properly classified, the proper method

of reaching that is by ordinance directing a re-classification in accordance with the duties and requirements of the position. But the time of year that this is done with reference to the passage of the appropriation bill, under the theory we have advanced, is immaterial in case the City Council acts by ordinance which overrides contrary provisions in the appropriation bill.

With respect to the power of the City Council relative to appropriations which may be made after the passage of the Annual Appropriation Bill and prior to July 1st, the whole matter is covered in the proviso that appears in Section 2 of Article VII of the Cities and Villages Act, which says that it "may, at any time within the first half of the fiscal year, by a two-thirds vote of all the members of such body, pass additional or supplemental appropriation ordinances making appropriations from any receipts derived from any other source than the annual taxes levied in accordance with the provisions of Section 1 of Article VIII."

The purpose of allowing additional and supplemental appropriations to be made was to amplify the Annual Appropriation Bill, which had been found too rigid in this respect. It was not the intention to make the flexibility of the appropriations so great as to throw down all the bars. There is, in other words, no such thing as shifting from one appropriation to another during the period that elapses after the passage of the Appropriation Bill up to July 1st. If, during that time, it is found that appropriations for any particular thing required are insufficient, a way is provided for making additional appropriations. That is all that this provision is intended for.

After July 1st a shift from one appropriation to another within the department is permissible under Section 2A of Article VII, which provides that the City Council "shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within the department or other separate agency of the municipal government, of sums of money appropriated

for one corporate object or purpose to another corporate object or purpose.''' In brief, the statute permits additional appropriations up to July 1st, but after that date in case an emergency should arise whereby money is required for a specific purpose that has not been appropriated for that purpose, means can be found for securing this money by a shift in the appropriations within the department.

You also ask to be advised whether the City Council may alter any financial policy or pass legislation to cope with a situation that has arisen on account of unusual losses in collections from taxes.

Whatever change in policy there may be on the part of the City Council would have to be within the terms of the Appropriation Bill and the modifications permitted by statute as above outlined. It is not only proper, but it is the duty of the City Council to so guide the affairs of the City that no financial distress may come to the City by reason of a shortage of funds. If it can find means of economizing, such means should be employed. Our courts have laid down rules which very exactly define the limits beyond which officers of the City cannot go in laying off employes. Such procedure may, however, be adopted in case it is done for the purpose of economizing where the needs of the City require it, and this is especially true if it is sanctioned by direct action on the part of the City Council. In other words, if it is found necessary to lay off some employes in order to save money, it can be done if the spirit of the Civil Service Law is not evaded. It goes without saying that so far as retrenching in the shape of stopping work on improvements or the purchase of materials, etc., is concerned, that is clearly within the power of the City Council.

We believe the above answers all questions that you have put to us.

Very truly yours,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Ordinance Relating to Fierce Dogs — Discretion of City Officers in Enforcing the Same.

May 8, 1923.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

Replying to your request for an opinion relative to whether, under Section 1059 of the Chicago Municipal Code of 1922, a dog biting a person on the premises of the owner is or is not required to be taken to the pound for observation for a period of thirty days, we respectfully submit the following:

The section in question reads as follows:

“FIERCE DOGS—IMPOUNDING AND DISPOSITION THEREOF.) Any dangerous, fierce or vicious dog running at large in the streets or public places of the city or upon private premises of any other person than the owner or keeper, and any dog which may in any manner disturb the quiet of any person or neighborhood, or which shall bite a person or so injure a person as to cause an abrasion of the skin, is hereby declared to be a nuisance, and such dog shall be taken up and impounded in the manner provided for by the ordinances of the city.

“It shall be unlawful for the owner or keeper of any dog, when notified that such dog has bitten any person or has so injured any person as to cause an abrasion of the skin, to sell or give away such dog or to permit or allow such dog to be taken beyond the limits of the city, but it shall be the duty of such owner or keeper, upon receiving notice of the character aforesaid, to deliver such dog to any policeman; whereupon such policeman shall forthwith convey such dog to the place set aside by the superintendent of police as a dog pound, where such dog shall be securely chained or confined for a period of at least thirty days. But if any dangerous, fierce or vicious dogs cannot safely be taken up and impounded, such dog may be slain by any policeman; provided, however, that in all cases where any dog which has bitten

a person or caused an abrasion of the skin is slain by any policeman, whether by order of court, or otherwise, and a period of less than fifteen days has elapsed since the day upon which such dog bit any person or caused an abrasion of the skin of any person, then, and in such event, it shall be the duty of the policeman slaying such dog to forthwith deliver the carcass and the brain of such dog to the department of health.

"It is hereby made the duty of any person receiving a dog from the place where it has been impounded by the department of police, to securely muzzle and chain such dog for a period of at least fifteen days from the date of receiving the dog from such place.

"Any person violating any of the provisions of this section or neglecting or refusing to comply with any of the provisions hereof shall be fined not less than five dollars nor more than two hundred dollars for each offense."

In our opinion, this section clearly gives to the representatives of the City the *right* and *authority* to convey any dog to the dog pound and keep him there for thirty days, whenever such dog has bitten anybody, no matter what the circumstances under which the bite was inflicted, whether accidentally and playfully or with vicious intent, and however harmless the dog may apparently be.

On the other hand, however, if the question be asked whether it was the intention of the City Council, by this section, to absolutely take away *all* right of discretion and judgment on the part of the officials charged with the execution of the law, and to lay down a hard and fast rule which must be applied alike to all cases regardless of difference in circumstances, we are constrained to answer that, in our opinion, the section should not be interpreted with such technical strictness. As a general rule, it is the policy of the law to allow a certain amount of discretion in the administration of laws and legislative enactments will not be construed to entirely take away that discretion, unless, at least, they say so in express terms; which is not done in the present case.

In many cases, no doubt, the only way to make sure whether a dog is afflicted with rabies, is to convey him to the

dog pound and keep him there for thirty days. That such extreme course is necessary in absolutely every instance, however, we are inclined to doubt; and we believe that it was the intention of the City Council to leave this, as well as many other matters in connection with the enforcement of the law, to the sound discretion of those charged with such enforcement.

Yours very truly,

CARL J. APPELL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Liability of City and Pennsylvania Co. to the Sanitary
District for Damages Sustained by John B. Mal-
lers in Connection with the Construction of a
Bridge by the Sanitary District.**

May 8, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Replying to your request for an opinion as to the liability of the City of Chicago relative to a judgment for \$9,071.63 obtained in the case of *John B. Mallers v. City of Chicago and the Sanitary District*, Superior Court of Cook County, General No. 331106, we beg to advise you as follows:

This suit was brought for damages resulting to the property of John B. Mallers from the construction by the Sanitary District of Chicago of the new Jackson boulevard bridge. In the Council Proceedings of December 23, 1912, page 2837, a contract was entered into between the Sanitary District of Chicago, the City of Chicago and the Pennsylvania Company, a corporation, existing under the laws of the State of Penn-

sylvania, providing in substance that the Sanitary District should be granted the right to construct a new bridge over the Chicago river on Jackson boulevard. Section 15 of the said contract is a covenant made by the City of Chicago and agreeing to indemnify the Sanitary District from any liability which may accrue against it by virtue of the construction of the said bridge. Section 16 of the said contract is a covenant by the Pennsylvania Company whereby the company in substance also agrees to indemnify the said Sanitary District from all loss or liability which may accrue by virtue of the construction of the said bridge, provided the bridge is built substantially in accordance with the plans and specifications, and provided that the damage resulting is caused by the difference in character of the new bridge. So far as we have been able to ascertain, the said bridge was built substantially in accordance with the plans and specifications, and the damage in this suit was caused by a change in the character of the said bridge. Therefore, the City of Chicago and the Pennsylvania Company are both jointly liable to the Sanitary District for the damage caused to the plaintiff in the instant case.

The Pennsylvania Company was formerly a party defendant to this case, but pending the trial it was dismissed from the proceedings so that the judgment runs entirely against the City of Chicago. The City of Chicago, therefore, is liable to the Sanitary District for the entire amount of this judgment. The Pennsylvania Company, under the terms of the contract, is liable to the City of Chicago for half of the amount of this judgment, which would be \$4,535.82, and which would have to be collected from the Pennsylvania Company by a separate action brought by the City of Chicago for contribution.

This office is, however, advised by the attorneys for the Sanitary District of Chicago, that the bill of exceptions has been prepared by the Sanitary District in this cause and that said bill has been presented to the trial judge and signed by him. The said bill is now in the hands of the attorney for the plaintiff pending his approval.

Since the attorneys for the Sanitary District have seen fit to perfect their record by the presentment of a bill of exceptions, pursuant to suing out a writ of error, the judgment of the trial court is not, in our opinion, a final judgment, and will not become so until the said cause has been passed upon by a court of review, or until the time has expired within which a writ of error may be brought. That time will not expire until two years from the rendition of judgment by the trial court, namely, the 20th day of January, A. D. 1925.

Accordingly, our recommendation is that the City of Chicago should not pay this claim until final order has been entered by the court of review, or until the time to sue out a writ of error, as aforesaid, has expired.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Claim of Civil Service Employees for Salary While
Unlawfully Suspended—Civil Service Employee
May Not be Suspended for More Than 30 Days.**

May 9, 1923.

HON. NICHOLAS R. FINN, President, Civil Service Commission.

Dear Sir:

We hereby acknowledge receipt of your letter of May 4th, wherein you ask to be advised with respect to the matters following:

“Sergeants of Police Cox, Hayes and Rabbet (of the Motor Division), were suspended February 2, 1923, for al-

leged brutality to a prisoner. They were subsequently indicted and the case is undisposed of in the Criminal Court. They were restored to duty April 14, 1923.

The sergeants' claim their suspension should not have exceeded thirty days and they should have been reinstated March 14, 1923. Their total suspension amounts to 70 days. They claim salary for the 40 days in excess of the thirty day period."

Relative to the aforesaid sergeants' claim that their suspension should not have exceeded 30 days, and that they should have been reinstated March 14, 1923, we submit that Section 12 of the City Civil Service Act, among other things therein, provides as follows:

"Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."

In the case of *Thomas v. City of Chicago*, 273 Ill. 479, on page 483, the court said:

"The language of Section 12 is explicit and unambiguous. It provides squarely that 'nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days.'"

and then goes on to say, in substance, that an employe may, in good faith, be suspended for a period not to exceed 30 days.

In view of the foregoing, we are of the opinion that when 30 days of their said suspension had expired these men were entitled to be reinstated to their respective positions.

Relative to their claim for salary for the 40 days in excess of the first 30 days of their suspension, we find in the case of *The People v. Coffin*, 282 Ill. 599, which involved both the right to the position and the salary attached thereto, the court, on page 613, said:

"The main question involved was the right of the relator to be restored to the position in question, and the order restoring him carried with it the right to the

salary or compensation attached to such position as far as an appropriation had been made therefor."

And in the case of *Roderick v. City of Chicago*, No. 25438, decided in the March term of the Appellate Court, 1920, which was an action to recover salary, the court said:

"The right to a position carries with it the salary attached to it."

City v. Luthardt, 191 Ill. 516.

Flynn v. City, 197 Ill. App. 580.

McArdle v. City of Chicago, 216 Ill. App. 343.

Reinstatement of these sergeants to their respective positions on April 14, 1923, re-established their legal right to the same. The fact that subsequent to their said suspension they were indicted and the case is undisposed of in the Criminal Court, is not material to the question of their right to the salary which they claim.

Therefore, inasmuch as it does not appear that the salary claimed or any part thereof has, in good faith, been paid to some person, or persons, who have occupied and performed the duties of the respective positions of said sergeants during said period of suspension, we are of the opinion that the said Sergeants Cox, Hayes and Rabbet, and each of the same, are legally entitled to the salary attached to their respective positions for the 40 days following the expiration of the first 30 days of their said suspension.

We herewith return to you the Civil Service report which accompanied your letter relative to the reinstatement of said sergeants.

Yours very truly,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of City to Lease Portions of Municipal Pier for
Entertainments—Certain Leases Void Which
Do Not Comply With the Statute.**

May 10, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Replying to your request for an opinion as to the validity of certain leases heretofore entered into by the City of Chicago with certain parties, viz., a lease between the City of Chicago and Henry J. Kramer, a lease between Henry J. Kramer and the Pageant of Progress and a lease between the City of Chicago and the Health and Sanitation Exposition, we desire to submit the following:

The ordinances passed by the City Council at various dates conferring authority upon the City of Chicago to enter into these various leases are as follows:

Council Proceedings of December 8, 1920, page 1236:

"Be it ordained by the City Council of the City of Chicago:

SECTION 1. That the Chairman of the Harbor Board be and he is hereby authorized and directed to enter into a lease with Henry J. Kramer, of the City of Chicago, for the rental of the north side of the upper deck of the Municipal Pier, known as the Passenger Deck, for a term of five and one-half ($5\frac{1}{2}$) years, beginning July 1, 1921, and ending December 31, 1926, at an annual rental of twenty-five thousand dollars (\$25,000).

SECTION 2. This ordinance shall be in full force and effect from and after its passage."

Council Proceedings of April 25, 1921, page 55:

"Be it ordained by the City Council of the City of Chicago:

"SECTION 1. That the Chairman of the Harbor Board be and he is hereby authorized and directed to

enter into a lease with the Health and Sanitation Exhibition, for the rental of the south side of the upper deck of the Municipal Pier, known as the passenger deck, for a term of five and one-half (5½) years, beginning July 1, 1921, and ending December 31, 1926, at an annual rental of twenty-five thousand (\$25,000) dollars.

SECTION 2. This ordinance shall be in full force and effect from and after its passage and approval."

Council Proceedings of June 28, 1921, page 698:

"Be it ordained by the City Council of the City of Chicago:

SECTION 1. That the Commissioner of Public Works be and he is authorized to negotiate with the Pageant of Progress a lease of so much and as the Pageant of Progress may desire for offices for a term of five and one-half years and at a rental of \$1.50 per square foot per annum for the space leased.

SECTION 2. This ordinance shall be in force and effect from and after its passage."

All leases for space on the Municipal Pier must be governed strictly by the provisions of the Harbor Act of 1911. For it is well established law that when the legislature has delineated a certain mode by which the City is to act, such mode of action is exclusive and no other mode can be followed. The following cases are cited:

Gaddis v. Richland County, 92 Ill. 119, at 123.

Helm v. City of Grayville, 224 Ill. 274, at 278.

City of Mt. Carmel v. Shaw, 252 Ill. App. 429, at 433.

The said Harbor Act of 1911 expressly confers the right upon the City of Chicago to lease space on the pier for recreation purposes. We quote the sections conferring such authority:

"USE FOR PUBLIC RECREATION PURPOSES ANY PORTION OF UTILITY NOT NEEDED FOR TRANSPORTATION USES.) Section 17a. Every such city and village shall also have the right, power and authority and such right, power and authority are hereby granted to use for public recreation purposes any portion of any such utility which is

not immediately needed for transportation uses or which can be used for such recreation purposes without interfering with the use of such utility for transportation purposes in the judgment of the corporate authorities of such city or village. (Added by amendment by act approved and in force May 18, 1917, L. 1917, p. 240.)

MAY LEASE OR CONTRACT FOR THE SALE IN OR ON SUCH UTILITY OF FOOD, ETC.—GIVE ENTERTAINMENTS, ETC.—TERMINATION OF LEASE.) Section 17b. In connection with the use of any portion of such utility for recreation purposes, as specified in the previous section hereof, every such city and village shall, also, have the right, power and authority and such right, power and authority are hereby granted to provide, by lease or contract, for the sale in or on such utility of food, non-alcoholic drinks and merchandise and for the giving in or on such utility of dances, concerts, exhibitions and other entertainments and for check-room privileges incidental thereto: *Provided, however*, that each such lease or contract shall be terminable by such city or village, either with or without compensation therefor as may have been therein stipulated, upon reasonable notice, whenever in the judgment of the corporate authorities of such city or village the transportation necessities shall make such termination desirable: *And provided, furthermore*, that no such lease or contract shall be entered into for a period exceeding five (5) years except in conformity with the provisions of Section 11 of this act. (Added by amendment by act approved and in force May 18, 1917, L. 1917, p. 240.)

ORDINANCE FOR LEASE OF UTILITIES IN EXCESS OF FIVE YEARS NOT GO INTO EFFECT FOR 90 DAYS—PETITION—REFERENDUM.) Section 11. No ordinance of any such city or village providing for the leasing of any portion of any harbor, wharf, dock, pier, quay wall, slip, levee, connection or other harbor utility acquired or constructed under the provisions of this act (and authorized by this act to be leased), for any period in excess of five years, shall go into effect until ninety days after the passage thereof, and if within such ninety days a petition shall be filed in the office of the city or village clerk of such city or village, signed by five per cent (5%) of the registered voters of such city or village, as shown by the last preceding election held in such city or village, requesting

that such ordinance be submitted to popular vote, it shall be the duty of said city or village clerk within three days after the filing in his office of such petition, to file the same, together with a copy of the ordinance, certified by said city or village clerk to be a true copy thereof, in the office of the officer or officers having jurisdiction over elections in such city or village, and it shall thereupon be the duty of such election officer or officers to submit to the electors of such city or village, in the same manner as is provided by Section 2 of an act entitled, 'An Act providing for an expression of opinion by electors on questions of public policy at any general or special election,' approved May 11, 1901, at the first succeeding general or special election occurring more than ninety days thereafter or at a special election called by the city council of such city or village for that purpose in the manner provided by Article IV of an act entitled, 'An Act to provide for the incorporation of cities and villages,' approved April 10, 1872, the question of whether or not such ordinance shall be approved and such ordinance shall not go into effect until it shall have been approved by a majority of the electors voting thereon at such general or special election: *Provided, however,* that each ordinance providing for such leasing shall have a true copy of such proposed lease thereto attached."

It should be noted that this section provides that when a lease of a portion of the pier for recreation purposes is for a greater period of time than five years, the said lease must comply with the above quoted provisions of Section 11. The above quoted leases are all of them for a period of five and one-half years. Investigation shows that the above quoted provisions were never complied with. Therefore, these leases are in legal contemplation null and void for failure to comply with the statute.

The leases are also void because they constitute an unlawful usurpation of legislative power by the Commissioner of Public Works. The ordinances providing for them do not contain any of the provisions, agreements and covenants which are found in the leases. Those provisions were inserted in entirety by the Commissioner of Public Works, an administrative official of the City. Such action on the part

of the Commissioner of Public Works was a legislative act which is unlawful. We refer to the following cases:

Noel v. People, 187 Ill. 587.

Saddler v. People, 188 Ill. 243.

Lee v. O'Malley, 69 Misc. 215; 126 N. Y. S. 775.

Maxwell v. State, 40 Md. 273.

In passing, attention may be called to the fact that any such lease of space for recreation purposes on the pier may be terminated after a reasonable notice whenever, in the opinion of the City Council, the said space is needed for transportation purposes. This provision appears in the above quoted section of the Harbor Act. However, since these particular leases are null and void for the reasons above stated, there is no need for an expression of such an opinion by the City Council. The said lessees are at present occupying the pier without any express or valid authority so to do, and can be compelled to vacate the same after reasonable notice.

A certain phase of the effect of holding these leases null and void is of significance in the following way: There are in the said leases, certain covenants which provide that all permanent fixtures erected by the lessees shall remain the property of the lessees, and that at the termination of the said leases the City of Chicago shall pay the said lessees a reasonable sum for the purchase of said fixtures. However, if the said leases are null and void, then the agreement by the City to purchase these fixtures is null and void and the fixtures, automatically by operation of law, become the property of the City, and the City is not obliged to pay any compensation whatsoever therefor.

Your communication to this office also requests an interpretation of the exact space leased to Henry J. Kramer, described in Paragraph 1 of the lease between the City of Chicago and Henry J. Kramer. It will be noted that the above quoted sections of the ordinances conferring power on the City to make these leases provides that the space which may be leased to Henry J. Kramer is only space upon the second floor of the north side of the Municipal Pier.

While it is true that the council later granted the right of the Commissioner of Public Works in the ordinance of June 28, 1921, to lease space for offices on the Municipal Pier to the Pageant of Progress, still no such lease was ever entered into pursuant to this authority. The only other lease which involved the Pageant of Progress was the lease between Kramer and the Pageant, and obviously Kramer could only assign that amount of space which, under his lease, he was authorized to use. The lease to Kramer purports to lease certain parts of the pier, viz., offices and transformer vaults on the first floor. But since the lease clearly exceeds the authority of the ordinance in regard to the leasing of space in these last mentioned localities on the pier, the right to use any space other than space located on the second floor of the north side of the pier could not in anywise be construed to be granted by this lease. However, since this lease is null and void in its entirety, for the reasons above stated, it would be, perhaps, more accurate to say that no space is leased to Kramer by the terms of this lease because the entire contract is null and void.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Acquisition of Property by City by Eminent Domain for Purposes of Playground.

May 10, 1923.

HON. JACOB M. ARVEY, Alderman 24th Ward.

Dear Sir:

Your letter of the 27th instant, addressed to this office, requesting an opinion as to whether or not, by virtue of the

exercise of its power of eminent domain, the City of Chicago can acquire certain property for playground purposes, has been referred to the writer, and in answer thereto, the following opinion is respectfully submitted:

Section 6 of Part 3 of Article XII of the Cities and Villages Act, said Article XII relating specifically to the City of Chicago, provides:

“The City of Chicago may acquire, by purchase or otherwise, municipal parks, playgrounds, public beaches and bathing places, and improve, equip, maintain and regulate the same.”

In the opinion of this office the words: “may acquire by purchase or otherwise,” are sufficiently broad to include within their purview the acquiring of public property for playground purposes by condemnation and, therefore, by virtue of this Act, the City of Chicago can acquire the property in question for playground purposes by exercising its power of eminent domain.

The procedure in such cases is set out in Chapter 47 of Smith's Illinois Revised Statutes for 1921, said chapter being entitled, “Eminent Domain,” and said procedure is the same as in any other instance when the city exercises its right of eminent domain. The statute provides that a petition be filed in certain specified courts by the municipality by its proper representative, and the case then proceeds in accordance with the practice provided for in said statute.

Yours very truly,

JUNIUS C. SCOFIELD,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**In Re: Contract of White Paving Company for Paving
Ogden Avenue From the South Line of Rees
Street To the North Curb Line of
Division Street.**

May 11, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your communication of April 23, 1923, in the above matter was referred by me to Mr. Philip J. McKenna, Attorney for the Board of Local Improvements. Under date of May 7th Mr. McKenna gave me the following opinion, which has my entire approval:

"1. This is a temporary pavement and was so intended to be, as Ogden avenue from Rees street to Division street is to be graded on an incline as soon as the work of the building of the viaduct south of that point will be begun and carried on.

"2. The paving in question appears to have been undertaken and completed under the supervision of the former Commissioner of Public Works, Mr. Charles R. Francis, for the agreed price of \$74,963.48 and not under the supervision of the Board of Local Improvements. The cost of making this improvement was at no time understood to be paid for by special assessment. Hence, the Board of Local Improvements never acquired jurisdiction of the subject-matter of the work of the contract under consideration.

"3. The order of the City Council under date of November 15, 1922 (Council Proceedings, page 1324), referred to in Mr. Breen's letter, authorized the Commissioner of Public Works to advertise for bids for the work in question, and also 'authorized and directed' the City Comptroller and City Treasurer to transfer an appropriation for the Board of Local Improvement from account
450 R-12 for paying judgments, to the credit of account
450 X-11 for construction, the sum of \$65,000.00.

"4. Both of these funds are to be used only in furtherance of the improvement of Ogden avenue, by special

assessment, and in my opinion cannot be diverted, or used for any purpose other than that for which they were created.

"5. The instrument purporting to be a contract for the performance of this particular work was never signed by the Commissioner of Public Works, or by any official on behalf of the City. The form of the agreement clearly indicates that, to make the contract mutual and, therefore binding, it was originally intended to be executed on the part of the City by the Commissioner of Public Works, and not by the President of the Board of Local Improvements.

"6. You will therefore see that the Board of Local Improvements is in nowise involved in this controversy, and that the proceeds, or any part thereof, of the bond issue for the improvement of Ogden avenue, should not be used, or in any manner expended, for work ordered to be done by the Commissioner of Public Works, by contract or otherwise.

"7. Attached hereto is a copy of a report compiled and prepared by an investigator at the instance of the Committee on Finance. This report goes into elaborate detail and makes a chronological review of the various steps taken in the transaction from its incipency. I respectfully recommend a careful perusal of this report, as it throws a good deal of light upon the subject. Your attention is especially directed to paragraph one, page six of the report, to which reference is here made, wherein it appears that the specifications call for 'two inches of asphalt wearing surface, two inches of binder course and a concrete base of eight inches', whereas the report sets out that the completed job has only a binder course of one and one-half inches and a concrete base of only six inches.

"8. Assuming this statement of the investigator of the Committee on Finance to be correct, the discrepancy between the specifications and the work as completed is so glaring that the matter ought to be further investigated, in justice to all parties concerned, before payment of this claim is made.

"9. It is my opinion, therefore, after a careful consideration of the subject, that:

- (a) This matter is entirely outside the jurisdiction of the Board of Local Improvements;
- (b) The claim of the White Paving Company should in no event be paid from the proceeds of the Ogden

avenue bond issue, for the reason that the work in question has not been done by special assessment, no attempt having been made to comply with the provisions of the Local Improvement Act;

- (c) No contract exists between the City of Chicago and the White Paving Company, so far as this particular matter is concerned;
- (d) No part of this claim should in any event be paid to the contractor unless it be clearly shown that the paving, as completed, has been performed in reasonable compliance with the specifications."

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of the City to Use An Invention Without Paying
Royalties to Owner of Patent When the Latter
Invented the Device While in the
Employ of the City.**

May 11, 1923.

HON. ROSS A. WOODHULL, Chairman Committee on Finance.

Dear Sir:

Your communication of May 1, 1923, enclosing file concerning the matter of the payment of royalties for certain patented globe holders, and requesting this department to advise you as to whether or not the City might be able to prove the right to the use of a certain patented device without payment of royalties, has been duly received.

The file submitted to this department does not contain any statement of facts which would enable us to render an opinion upon the subject requested.

It appears from the papers submitted to us that a certain globe holder patented by two men, Messrs. Woodliff and May, employed by the Department of Gas and Electricity, has

been used by the City without the payment of royalties, in accordance with an opinion formerly rendered by this department.

The determining facts upon which this opinion was rendered were that Messrs. Woodliff and May perfected the details and mechanical construction under the orders and in conformity with the ideas and suggestions made by Mr. F. H. Snyder, Operating Engineer in the department, who was performing this work in pursuance of his official duties.

It appears further from the papers, that a second device of the same general kind, but differing in some material respects, was patented by a man named Barclay (who is now employed by the West Park Board), and it is upon the right to use this device without royalty that the opinion of the department is sought.

No further facts are stated either as to Mr. Barclay's connections with the city, the West Park Board, or whether he was otherwise employed at the time he perfected this device and patented it, and it does not appear whether the invention was or was not in any way connected with his official duties, if he had any at that time.

To state the case hypothetically, if Mr. Barclay, at the time that he conceived, perfected and patented this invention was employed by the city or any of its departments, and if this work was done in the due course of his employment, or if it were done in the following out of any plan or suggestion made to him by his superiors, the city would be entitled to the use of said invention without expense to it.

The law governing this case has been well settled and is expressed by the Supreme Court in the case of *Agawam Company v. Jordan*, 7 Wall U. S. 74, wherein the court said:

“Where the employer has conceived the plan of invention and is engaged in experiments to perfect it, no suggestions from any employee not amounting to a new method of arrangement which in itself is a complete invention is sufficient to deprive the employer of the exclusive property in the perfected invention.”

And again the Supreme Court of the United States in the case of *Minerals Separation, Ltd., v. Hyde*, 242 U. S. 261, said:

“The claim that the patentees of the patent in suit are not the original discoverers of the process patented because an employee of theirs happened to make the analyses and observations which resulted immediately in the discovery, cannot be allowed. The record shows very clearly that the patentee planned the experiments in progress when the discovery was made; that they directed the investigation day by day, conducting them in large part personally and that they interpreted the results.”

If the history of Mr. Barclay's invention corresponds generally with the above stated hypothesis, the city would be entitled to the free use of the patented article in question.

To state the case hypothetically from the opposite point of view, if Mr. Barclay, although employed by the city and performing the duties assigned to him in his department of service, entirely of his own volition and without suggestion or direction from his superiors, exercised his inventive faculties independently of his work and conceived, perfected and patented this invention, then the right to the exclusive use of the invention would undoubtedly rest in him without qualification.

The law concerning this hypothesis is again clearly stated by the Supreme Court of the United States in the case of *Solomon v. U. S.*, 137 U. S., page 342, wherein the court said:

“The government has no more power to appropriate a man's property invested in a patent than it has to take his property vested in real estate; nor does the mere fact that an inventor is at the time of his invention in the employ of the government transfer to it any title to, or interest, in it. An employe, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property. There is no difference between the government and any other employer in this respect.”

If the history of Mr. Barclay's invention corresponds generally with the second hypothesis herein stated, the city would not be entitled to the use of his patented article without compensation to him, to be contracted for in the due course of business.

From the hypothetical statements above made, it may be that your committee will be able to obtain sufficient information concerning the facts of Mr. Barclay's invention to enable it to apply the proposition of law stated in this opinion.

If, however, further information concerning the facts of this case leaves your committee in doubt as to the application of the law, or if upon further information concerning the fundamental facts, you wish the opinion of this department as to the city's legal right in the premises, we will be very glad to further advise you upon receiving a sufficient statement of the material facts to enable us to do so.

Yours very truly,

JOSEPH R. W. COOPER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Construction and Maintenance of Bulkhead by Admiral Hotel at Foot of Foster Avenue Which Cuts Off Access of Bathers to Lake.

May 11, 1923.

HON. FRANCIS X. BUSCH, Corporation Counsel.

Dear Sir:

Complying with your request for an opinion relative to the controversy of the Department of Public Works with the

Admiral Hotel over a bulkhead built by the Admiral Hotel Company at the foot of Foster avenue and Lake Michigan, I desire to advise you that I have looked into the matter, and herewith submit the following report:

At some time during the years of 1920 and 1921 the Admiral Hotel Company was interested in securing the building of a concrete bulkhead at the foot of Foster avenue for the purpose of preventing the water of Lake Michigan from washing away the foundation of the said Foster avenue. Negotiations were entered into with the Harbor Department and with the Department of Public Works, and the Admiral Hotel Company was advised that at that time the City of Chicago did not have the requisite fund with which to build such a bulkhead. The Hotel Company then offered to build the bulkhead at its own expense. The Commissioner of Public Works accepted this proposition, and requested the Harbor Master to issue a permit to the Hotel Company for the construction of the said bulkhead, the customary fee being waived due to the fact that the bulkhead was being constructed at the expense of the Hotel Company. Apparently the permit was issued rather hurriedly and without proper investigation into the details of the construction of the proposed new bulkhead, in particular with regard to whether or not the said bulkhead would cut off the access of bathers from Foster avenue to the beach at the foot of Foster avenue.

In pursuance of the said permit, the said bulkhead was erected by the Hotel Company. The bulkhead as erected was built of concrete and was $2\frac{1}{2}$ feet above the level of Foster avenue, without any opening which would permit access to bathers from the street to the bathing beach. The bulkhead as constructed completely cut off such access. The result of placing the bulkhead on the beach at that point, was that the waters of Lake Michigan began to carry away the beach near Foster avenue, with the result that the present situation is, that the beach at that point has practically disappeared. When the situation in regard to access to the beach was called to the attention of the City, the Department of Public Works took the matter up with the Hotel Company, and the Hotel

Company promised to and did erect a structure, consisting of a wooden stairway which permitted access to the beach from the avenue over the bulkhead. This stairway, however, was inadequate and was soon washed away by a storm. It was also discovered that the only way to prevent the washing away of the beach at this point would be the erection of a jetty projecting into the lake at right angles to the shore. The present situation, then, is, that the beach is almost completely washed away, and access to the lake from Foster avenue is completely cut off by said bulkhead. The remedy for the situation as recommended by the Harbor Master of the City of Chicago, is that an opening be made in a portion of the concrete bulkhead, and space cut in the concrete which will permit of proper access to the beach, and the erection of a jetty, which will result in accumulation of sand for a beach at that point. The proposition now is, whether the Hotel Company or the City of Chicago shall pay for the expenditures necessary to construct these improvements.

It is submitted that the erection of a concrete bulkhead cutting off access of the people to the lake, when it is not necessary or reasonable that such access should be cut off in order to maintain a bulkhead there, is an illegal act. The following section of the Rivers and Lakes Commission Act, Chapter 19 of Smith's Illinois Revised Statutes of 1921 is as follows:

"73. *Rights of the people*) Section 26. Said Department of Public Works and Buildings shall, for the purpose of protecting the rights and interests of the State of Illinois, or the citizens of the State of Illinois, have full and complete jurisdiction of every public body of water in the State of Illinois, subject only to the paramount authority of the Government of the United States with reference to the navigation of such stream or streams, and the laws of Illinois, but nothing in this act contained shall be construed or held to be any impairment whatsoever of the rights of the citizens of the State of Illinois to fully and in a proper manner, enjoy the use of any and all of the public waters of the State of Illinois, and the jurisdiction of said Department of Public Works and Buildings shall be deemed to be for the

purpose of protecting the rights of the people of the State in the full and free enjoyment of all such bodies of water, and for the purpose of preventing unlawful and improper encroachment upon the same, or impairment of the rights of the people with reference thereto, and every proper use which the people may make of the public rivers and streams and lakes of the State of Illinois shall be aided, assisted, encouraged and protected by the Department of Public Works and Buildings. (As amended by act approved June 30, 1919.)”

In our opinion, the foregoing section makes such an obstruction illegal.

We also desire to call attention to the following section of the Chicago Municipal Code of 1922, which makes it the duty of the Harbor Master to remove any unlawful obstructions which have been placed in the harbor of the City of Chicago (“harbor” having been defined in Section 1690 of the said code to include “the waters of Lake Michigan, including all breakwaters, piers and permanent structures therein for a distance of 3 miles from the shore between the north and south lines of the City extended.”)

“1732. *Duty of harbor master to report encroachments.*) It shall be the duty of the harbor master to report to the city engineer any and all encroachments upon the harbor lines as now established or which may hereafter be established, and thereupon the said harbor master and city engineer shall take such action as may be necessary to enforce the provisions of this article and to remove or cause to be removed any such obstruction or encroachment. If it shall be found that any pile, stone, timber, earth, dock, bridge, or other obstruction whatever, has been placed in any part of the harbor in violation of the provisions of this chapter and that the person who has placed or caused to be placed therein refuses or neglects to remove such obstruction upon being requested so to do by the harbor master, city engineer, or commissioner of public works, the harbor master, city engineer, and commissioner of public works, or either of them, shall have the power, and it is hereby made their duty, to proceed forthwith to remove such obstruction and to charge the expense of such removal to the persons who placed such obstruction in the har-

bor, or caused it to be so placed, and the imposition of any fine or penalty hereby provided for against any person obstructing the harbor shall not be held to exempt any such person from a recovery by the City of the cost of removing any such obstruction.”

It should also be noted that although the City has issued a permit to erect this bulkhead, nevertheless the erection of such a bulkhead, which does not allow access to the lake, when the same could reasonably be allowed, is an illegal act. Therefore, the mere fact that the City has issued a permit to do this, does not later estop the City from tearing it down. As authority for the proposition of law that the City may not be estopped in the exercise of its police powers, the following cases are cited:

City of Litchfield v. Water Co., 95 Ill. App. 647, at 653.

Burton v. City, 236 Ill. 383.

Wise v. City, 183 Ill. App. 215.

City of Chicago v. Sexton, 115 Ill. 230, at p. 234.

Gregsten v. City of Chicago, 145 Ill. 451, at 464.

In conclusion, therefore, it is suggested that since the City of Chicago has the legal right to tear down this encroachment a basis of compromise with the Admiral Hotel is thereby afforded,—namely, that if the Hotel Company will, at its own expense, erect a jetty and provide means of access to the beach in the manner hereinbefore set forth, then the City will allow the said structure to remain.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Amendment of the Fire Prevention Ordinance.

May 12, 1923.

MR. JOHN PLANT, Acting Chief, Bureau Fire Prevention and Public Safety.

Dear Sir:

Your communication of May 4, 1923, with reference to the conflict between Sections 291 and 2279 of The Chicago Municipal Code of 1922, has been under consideration.

There is no doubt but that the provisions of the two sections in question are inconsistent. This conflict arose by reason of the fact that when, on May 3, 1922, extensive changes were made in the ordinances relating to fire prevention and inflammable liquids, that portion of the Code in which Section 291 is found had already been printed. It not having been called to our attention that the new section (now Section 2279) produced a conflict with the sections relating to filling stations contained in the automobile chapter, no correction of the old filling station ordinance was made. Had our attention been called to this matter at the time, Section 291 would have been re-written so as to conform to the provisions of the ordinance of May 3, 1922.

Under these circumstances, the proper procedure would be to correct the inconsistency by amending Section 291, so as to conform to Section 2279. We understand that operation under Section 291, prior to the passage of the ordinance of May 3, 1922, was not only difficult, but that it worked many hardships and was manifestly unfair to property owners in the immediate vicinity of proposed filling stations. Section 2279 was passed to obviate these difficulties, and it is understood that it would accomplish its purpose if operations were not held up because of Section 291.

If the above statement of the facts as we understand them, is correct, we would suggest that Section 291 be

amended, and that until such amendment is passed by the City Council, a person complying with all of the requirements of Section 2279 need not then be required to secure further frontage consents, but be given a permit to conduct a filling station upon payment of the license fee.

As to your last question relating to dry cleaning establishments, we would make substantially the same suggestion: that is, that the frontage consent provisions in Section 1416 be amended so as to conform to those of Section 2279. This would do away with all such cases as have arisen in the present instance.

At your request we shall be glad to prepare the necessary ordinances.

Very truly yours,

RUTH C. NELSON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right to Locate Hospital Near Forest Preserve in
View of Prohibition by Ordinance of Any Hos-
pital Within 200 Feet of a Public Playground.**

May 14, 1923.

HON. THOMAS J. BOWLER, Alderman 41st Ward.

Dear Sir:

Your letter of May 10th, making an inquiry as to whether or not the building of a maternity hospital on property adjoining the Forest Preserve would be a violation of the city ordinance forbidding the location of a hospital near a public playground, and further inquiring if, "the Forest Preserve is a playground or a park," has been duly received.

The ordinance to which you refer is Section 1863 of The Chicago Municipal Code of 1922, and reads as follows:

"LOCATION OF HOSPITAL NEAR SCHOOL OR PLAYGROUND. No hospital of any kind or description shall hereafter be erected or established within four hundred feet of any property used for a public or parochial school or as a public playground."

The Chicago Municipal Code of 1922 in Chapter 57, Section 2854, established a Bureau of Public Playgrounds and Bathing Beaches, and in Section 2866 in the same Chapter gives an official list of about seventy "Parks, Squares and Triangles," which are so designated. The same section gives an official list of sixteen other public places which it has formally designated as "Playgrounds," and further gives a list of other places, which are formally designated as "Bathing Beaches" and "Swimming Pools".

In Article 3 of Chapter 57, Section 2878, it is provided that,

"Each alderman for and in the ward which he represents may without a charge to the city provide such playgrounds, parks, breathing spaces and places of amusement, as he in his own judgment shall deem fit and may fence them in and provide all paraphernalia necessary, such playgrounds, parks, breathing spaces and places of amusement to be under the sole care and control of the alderman providing the same."

From the foregoing provisions of the code, which appear to be the only provisions which in any way define the words "park" or "playground," it will be seen that "Public Playgrounds" are by ordinance specifically designated as such and are distinguished from Public Parks, Squares and Triangles.

In view of the language in Section 1863 above quoted wherein the prohibition applies to the location "within 400 feet of any property used * * * as a public playground," it puts us upon inquiry to determine whether the prohibitive section has a broader application than to any public place officially designated as a "Public Playground."

The word "public park" as defined in Volume 6, page 5805, "Words and Phrases, Judicially Defined," defines a public park in the following language:

"A 'public park,' in the popularly accepted meaning of the present time, may be comprehensively defined as a public pleasure ground. The definitions by the lexicographers do not vary much from this. No doubt the idea of open air and space, with the land kept in grass and trees, as if approximately in the state of nature, still inheres in the general understanding of the word, but it is no longer the dominating thought, as it formerly was. The idea of a public park near a city, as a place of resort for recreation and amusement, necessarily banishes the idea of a home for wild beasts of the chase, even in a modified state of nature. Public parks are recognized as the natural place for walks, drives, awheel or with horse and carriage, boating, skating, and also as the appropriate location for monuments and statues, either to historic heroes or to pure art, fountains, flowers, music stands, and other agencies of enjoyment of the eye and ear. *Larid v. City of Pittsburg*, 54 Atl. 324, 325, 205 Pa. 1, 61 L. R. A. 332."

"In the idea of a 'public park' is comprehended more than a use, either occasional or limited by years, or susceptible of coexistence with a private right capable of concurrent exercise. The words suggest more than an open extensive area of land to be passed over or but temporarily occupied by the public, and on which any private person may still do acts of ownership. To create a public park an extensive area is needed; but the area must be improved, and in various processes, alterative and subversive of natural formation, must much money be absorbed and many years must go by before it is complete. And so costly, so extensive, so peculiar in character, and so undisturbed by interference, must be these processes and the results of them as that there is need of permanency and exclusiveness of public possession and control as against the exercise of any private right therein. *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 240, 6 Am. Rep. 70."

The above quoted definition and description of a "Public Park" within the meaning of the law is altogether too

comprehensive to admit of the contention that the City Council had in mind so large an area in choosing the language, "used as a public playground" as contained in Section 1863 above quoted, and while it is true that a section of a public park may incidentally be used as a playground and that children may play in many places therein, we cannot conceive that it was the intention of the council to forbid the building of any hospital within 400 feet of a city park. Certainly the location of a hospital near or adjoining a beautiful park would be a boon to the patients who would be benefited by the air and open spaces and to whom the enjoyment of the view of natural beauties would be available in the tedious hours of distress and in the time of convalescence.

Your letter of inquiry, however, goes further than the distinction between a park and public playground, and the material matter to be determined is whether the Forest Preserve of Cook County would be included in and within the meaning of the language used in the prohibitory section, "any property used * * * as a public playground."

The Forest Preserve is within the meaning of the statute clearly different from either Parks or Playgrounds, as above defined. Chapter 57a, Cahill's Illinois Revised Statutes 1921, provides partly as follows:

"That whenever any area of contiguous territory lying wholly within one county contains one or more natural forests or parts thereof and one or more cities, towns or villages, such territory may be incorporated as a forest preserve district," etc.

The statute then proceeds to designate the needed steps for the creation of a Forest Preserve, and provides for its organization, government and maintenance as a separate legal entity, similar in a way to the Board of Education or the Sanitary District.

Such an institution as the Forest Preserve although it includes some of the elements included within the legal definition of a park is essentially different, is fundamentally based

on a forest and is necessarily to some extent primitive and wild, and could not in our judgment, therefore, possibly be considered to come within the definition specifically of a Public Park, still less of a Playground, nor could the fact that such Forest Preserve contained some spots or open places which might be used by children as a playground be considered to bring it within the intention of the council in using the language, "any property used as a public playground." It is inconceivable that the City Council had in mind the Forest Preserve when it established the prohibition made in Section 1863 of the Municipal Code.

For that reason we are of the opinion that the Forest Preserve is neither a Park nor a Playground within the meaning of said Section 1863 and the building of a maternity hospital on property adjoining the Forest Preserve is not prohibited by ordinance in the City of Chicago.

Very sincerely yours,

JOSEPH R. W. COOPER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Form of Bonds Given by Employees in City Comptroller's Office.

May 16, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your communication of even date forwarding to us a copy of an official bond of the Southern

Surety Company and a form prepared by the United States Fidelity and Guaranty Company to cover the employees of the City Comptroller's office, and requesting us to return them both to you with our approval, if found correct, or to suggest any changes that we may deem desirable to make.

In reply, we desire to say that we approve of the form of bond prepared by the United States Fidelity and Guaranty Company, provided a form of acknowledgment as required by statute is added thereto.

As to the form of bond of the Southern Surety Company, we suggest that you require that company, as well as all other surety companies, to add to their form of bond the last paragraph contained in the form of bond submitted by the United States Fidelity and Guaranty Company, which reads as follows:

“The employer may at any time transfer the said employee, during the continuance of this bond from one position to another and shift the said employee about at pleasure without notice to the company and the company shall be and remain liable to the employer for any loss sustained through failure of the said employee to account for and pay over all moneys received by him in such position as fully and to the same extent as it is liable hereunder with respect to his performance of the duties of”

We also suggest that you require the foregoing paragraph to be embodied in the bonds of all employees in the classified service of whom bonds are required.

Yours truly,

JAMES W. BREEN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Power of City Real Estate Agent to Sign Frontage
Consents for City Property and Power of City
Council to Delegate Such Authority to Him.**

May 16, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have the letter of Mr. Joseph Peacock, real estate agent, in which he requests that we advise as to the power of the Comptroller to sign frontage consent petitions, for property owned by the City of Chicago, for the erection of any building, or the maintenance of any business therein, in the City of Chicago, for the issuance of a permit for the erection or maintenance of which the city ordinances require as a condition precedent the filing of majority frontage consents. He also requests that in case such authority does not exist, that we advise whether the City Council has the power by ordinance or order to delegate such power to the Comptroller.

The Comptroller, as an officer of the City of Chicago, has only such powers as are either directly or impliedly granted to him by either the State Legislature or the City Council. After a careful search of the statutes and ordinances, we find that no authority to sign frontage consent petitions in the name of the City of Chicago has ever been given to him. The City Council, on the other hand, has among other powers the authority "to control the finances and property of the corporation" (Clause 1 of Section 65 of Chapter 24 of the Statutes of the State of Illinois).

There is no judicial decision directly in point concerning the authority of the City Council to authorize the signing

of the City's name to frontage consent petitions, but the case of *Theurer v. The People*, 211 Ill. 296, is analogous. The court in the case just referred to had under consideration the question of the right of the South Park Commissioners to sign frontage consents for the conduct of a dramshop on a street adjoining one of the parks under the control of the South Park Commissioners. The court in passing on said question, at page 298 said:

"We do not, however, think the contention correct that the Park Commissioners have no legal power to sign for the park frontage. The legal title to all park lands is in the Commissioners. In *People v. Salomon*, 51 Ill. 37, it was said (p. 52): 'It is argued that this park property belongs to these Commissioners as a corporation. This is so by the terms of the act. They hold the fee, but the *usufruct* is in the public; but holding it, they hold it as a public corporation for public purposes.' The park board was created by an act of the legislature approved February 24, 1869, as amended April 26, 1869, by which it is provided that all lands acquired by said Commissioners shall be held, managed and controlled by them and their successors as a public park, for the recreation, health and benefit of the public, free to all persons forever; and it is also provided they shall have full and exclusive power to govern and manage said park, to lay out and regulate the same, to pass ordinances for the regulation and government thereof, and that said commissioners shall possess all the power and authority over said park now by law conferred upon the City Council of the City of Chicago in respect to public squares and places in said city. The powers thus conferred upon said commissioners over the real estate of the park, it will be observed, are very broad. It is the duty of the commissioners to improve and beautify said lands and to make the park a safe and pleasant place for the resort of the entire community, and it is not unreasonable to hold that they are interested in protecting the park and the public who resort thereto from surroundings which may be unwholesome, obnoxious or dangerous."

The fee to property owned by the City of Chicago is vested in the City and the fee to property owned by the

South Park Commissioners is vested in the park commissioners. In view of the similarity of the situation, we are, therefore, of the opinion that the City Council has the right to authorize the signing of the City's name to frontage consent petitions in connection with property owned by the City of Chicago. This would apply to all property owned by the said City with the exception of that which is used for school property.

The latter class of property is excepted because the naked title to such property is vested in the City of Chicago as Trustee for the Board of Education and the general supervision of all such property is vested in the said Board of Education by statute.

We come now to the question as to whether or not the City Council could lawfully delegate, by general ordinance, power to the Comptroller to either sign or refuse to sign the City's name to frontage consent petitions. In the case of *Block v. City of Chicago*, 239 Ill. at 251, the Supreme Court said at page 263:

"It has never been questioned that power may be delegated to officers to determine facts, such as whether animals are diseased so as to exclude them from importation; whether meat or food is found upon an inspection to be unhealthy or diseased; whether an assemblage amounts to a riot to be dispersed. There are numerous facts of that kind which must be left to administrative officers, and the ordinance is not invalid because the chief of police must determine the question of fact whether a picture or series of pictures is immoral or obscene."

In the case of *Noel v. The People*, 187 Ill. 587, the court said at page 591:

"A law which thus invests any board, or body of officials, with a discretion, which is purely arbitrary, and which may be exercised in the interest of a favored few, is invalid. It makes an unjust discrimination between persons coming within the same class. * * * Laws, thus conferring discretionary and arbitrary power upon

statutory officials, are not only invalid for the reasons already stated, but amount in effect to a delegation by the legislature of its legislative functions to the board or officials in question."

As to whether the delegation of the right to either sign or refuse to sign frontage consent petitions would or would not be an unlawful delegation of power, we are inclined to the latter view. We deem the safest way would be for the City Council to pass on each particular case.

We would suggest that a desirable way to handle the matter of either giving or refusing the City's consent on frontage consent petitions, would be to have a general ordinance passed by the City Council, which would provide that applications for the City's signature on frontage consent petitions be made to the Comptroller; that said official make an investigation as to the advisability of the City's signing and report his findings and recommendations to the City Council. The ordinance should further provide that after the City Council had decided the advisability of giving the City's consent in each particular case, that the City Comptroller, on order of the City Council, should have the authority to sign the name of the City of Chicago to the particular frontage consent petition in question.

If you desire such an ordinance drafted and will so inform us, we shall be pleased to prepare it.

Yours very truly,

FRANK W. DERBY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Status of Resignations of Members of the School Board
Made to the Former Mayor and Never Accepted
or Refused by Him.**

May 17, 1923.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

In compliance with your request for an opinion as to the legal effect of the resignations of certain members of the School Board heretofore tendered to the Mayor of the City of Chicago on, to-wit, June 5, 1922, and the present status of said members, I beg to submit the following:

On June 5, 1922, the personnel of the School Board was as follows:

Edwin S. Davis,	A. H. Severinghaus,
Boleslaus Klarkowski,	Sadie Bay Adair,
Pauline Struwing,	Mrs. Frances E. Thornton,
Hart Hanson,	John Coath,
Francis E. Croarkin,	Jacob M. Loeb.
George B. Arnold,	

The terms of Jacob M. Loeb, Mrs. Frances E. Thornton and George B. Arnold had expired at that time, and there were appointed on June 13, 1922, to fill these vacancies, Dr. John Dill Robertson, Mrs. Dorothy F. Ginsburg and Mrs. Johanna Gregg. A letter was received on June 5, 1922, by William Hale Thompson, then Mayor of the City of Chicago, containing the resignations of six of the above mentioned members of the board, viz:

Edwin S. Davis,
A. H. Severinghaus,
Boloslaus Klarkowski,
Mrs. Sadie Bay Adair,
Pauline Struwing,
Mrs. Frances E. Thornton.

The other members of the Board did not resign either at that time or at any future time. This letter, and the Mayor's response to it, appear in the Council proceedings of June 13, 1922, on page 522, and are substantially as follows:

"Office of the Mayor,
Chicago, June 13, 1922.

"To the Honorable, The City Council of the City of Chicago:

Gentlemen:—In the administration of the affairs of the Board of Education differences have unfortunately arisen, among members of the Board, apparently over matters of policy originally, but which seem to have become rather bitter personal differences, and which have made it impossible for the Board to function harmoniously. In this respect, the present Board is not different from the Boards which have preceded it. It can undoubtedly be recalled that for more than twenty years there has been more or less dissension among the members of the Board of Education.

"The situation becoming so acute that it threatened to interfere with the proper administration of school affairs, I requested all of the members of the Board to resign in order that a complete new Board might be appointed and thus restore harmony and efficient administration of school affairs.

"I confidently believe that all of the members of the Board were sincere in their protestation of abiding interest in the welfare of the schools, and that they would freely join in any well-considered plan to end the unpleasant situation.

"Six members of the Board showed their willingness to co-operate in this matter by joining in the execution of the following communication addressed to me:

"Chicago, Ill., June 5, 1922.

"Honorable Wm. Hale Thompson,
Mayor of Chicago,
Chicago, Ill.

"Dear Mr. Mayor—You have heretofore done us the honor of appointing us as members of the Board of Education of the City of Chicago, and thereby have shown your confidence in us by selecting us for these high and honorable positions. You informed us at the time of our appointment that your only aim or interest in the matter was to protect the interest of the school children and to keep the schools out of politics. We have given

our time and energy to the discharge of the exacting duties and responsibilities of these positions.

'In the administration of the affairs of the Board of Education differences have unfortunately arisen among members of the Board, which make it impossible for the Board to function harmoniously.

'We believe and deem it our duty to inform you that in our opinion the Board of Education as now constituted cannot function in harmony and in that spirit of co-operation essential to the best interest of the schools.

'We are willing, in order to show that we sincerely have at heart the best interests of the schools, to return to you the honorable commissions which you placed in our hands, with the approval of the City Council, and which we shall ever cherish in grateful recollection for the opportunity they afforded us for service in such a splendid cause.

'In order that you may have an opportunity to appoint a Board of Education that can function harmoniously, and having solely in mind, as we do, the interests of the school children, we hereby tender to you our resignations as members of the Board of Education of Chicago, such resignations to take effect forthwith.

(Signed)

EDWIN S. DAVIS,
A. H. SEVERINGHAUS,
BOLESLAUS KLARKOWSKI,
SADIE BAY ADAIR, M. D.,
PAULINE STRUWING,
MRS. FRANCIS E. THORNTON.'

"Unfortunately, certain members of the Board have seen fit to stand out against this plan, although it is difficult to understand why any person holding such an honorary commission requiring such a personal sacrifice, should insist on continuing to exercise the duties of the office, especially when such a determination upon their part must defeat the object sought to be attained. Under these circumstances, I cannot accept the proffered resignations of the six who are willing to make the sacrifice and in that way cast reproach upon their services when I had no thought of attempting to place any blame whatever upon any one.

"I hope that those members who are withholding their resignations will yet, for the public good, abandon their opposition to the restoration of harmony, and place

their resignations in my hands so that I can appoint an entirely new Board as intended.

"There are three vacancies on the Board at the present time which have occurred through the expiration of the terms of Jacob M. Loeb and Mrs. Frances E. Thornton, and by the resignation of Trustee George B. Arnold, who resigned upon being appointed Director of Labor of the State of Illinois by the Governor.

"In order that the reorganization of the Board of Education may not be further delayed, I deem it advisable to fill such vacancies as now exist on said Board, and am, therefore, submitting to your Honorable Body, in separate communication, the names of the persons I desire to appoint.

Respectfully submitted,

Wm. Hale Thompson,

Mayor."

The six resignations appearing in the above quoted letter were never withdrawn. The six members have, however, continued performing the usual duties of members of the Board. At the present time, excluding the six members who tendered their resignations at that time, all the other terms have expired, with the exception of that of John Coath. However, it is our understanding that the said John Coath has indicated his willingness to resign at any time when such resignation is desired by your Honor.

Upon these facts the question is presented of whether the said resignations can be accepted by your Honor, and, further, if your Honor should see fit to accept these said resignations, should they be accepted as of the present date, or as of the time when proffered.

Although there are a few authorities to the contrary, the law, both in the United States and England is clearly uniform on the proposition that a resignation only becomes complete after acceptance by the official competent to receive it. The broad rule of public policy underlying this principle of law is that all persons duly elected or appointed are obliged to serve as incumbents of public office. But the public itself, acting through the proper officer to receive the resignation, may accept the resignation. Thus, our Supreme

Court, in the case of *People ex rel. v. Williams*, 145 Ill. 573, at page 580, said:

“It follows, necessarily, that if to refuse the office is a common law offense, and punishable as such, that a legal duty attaches to the person to take upon himself the office, which may now be enforced by mandamus.

“While offices of this class, in England, were accepted as a burden, they have not been generally so regarded in this country. Under our system of local government, even the smallest offices are generally accepted, either because they are supposed to lead to those which bring higher honors and greater emoluments, or because of a sense of duty. To this fact, and perhaps to the prevalent but mistaken idea, that one holding a public office may resign at will, may be attributed the want of decision in this country upon the precise question at issue. The cases bearing upon this question, in this country, have ordinarily arisen, where the incumbent has sought to resign from public office. And it has been uniformly held, that the power to resign did not exist, or resignation become effective to discharge the officer from public duty, until accepted by lawful and competent authority.”

The following authorities in regard to this position are also cited:

Mechem on Public Officers, Sec. 414.

State v. Clayton, 27 Kan. 442.

Edwards v. U. S., 103 U. S. 471.

Hoke v. Henderson, 4 Dev. (N. C.) L. 1.

Van Orsdall v. Hazzard, 3 Hill (N. Y.) 243.

State v. Ferguson, 31 N. J. L. 107.

As an amplification of this rule of law the following corollary has been adhered to, viz., that an acceptance may be implied from the surrounding circumstances. Thus, in Illinois, in the case of *James M. Pace v. People ex rel. McMeen*, 50 Ill. 432, our Supreme Court, at page 434, said:

“We are, however, of opinion that the resignation was complete, and was so understood by the parties at that time. It was wholly unnecessary to enter an order upon the records accepting the resignation in form. The resignation was in fact received by the court, and handed

to their clerk to be placed on the files of the court, and was by him so filed. This was a virtual acceptance. Nothing was said about a future revocation, and the only reason why a successor was not at once appointed, was because one member of the court was absent. In two days thereafter, the appellant publishes his address to the people of the country, by which he seeks to have it understood that he has positively resigned. It is true, as urged by counsel, that the letter of resignation used the phrase 'tenders his resignation,' and the verb *to tender*, implies the offer of something for acceptance. Even in that view, as we have already stated, there was a substantial acceptance by the county court. But we attach no importance to the use of that word. We will not be so ungracious to the appellant as to suppose that he used it with a view to a subsequent revocation, in default of a formal acceptance by a resolution of the County Court spread upon the record, having, in the meantime, claimed before the people that he had voluntarily laid aside his office, and thus removed that objection to his election to another. If such was the purpose of appellant, he cannot expect the courts to aid him in its accomplishment. But whether or not he phrased his letter with a view to an ulterior revocation, it is very clear, from all the testimony, that was presented by him as an absolute resignation, to take effect *in presenti*, that it was so received by the County Court, and that he claimed the popular favor on the ground that he had resigned. He cannot complain at being required to abide by his own construction of his own act."

In the case of *United States v. Justices of Lauderdale County*, 10 Fed. 460, (Tenn.) at page 465, it was said:

"But it is conceded by the court in those cases to be a question of local law in each state, and we have no doubt whatever that under our state law it must be held that receiving, without dissent, and filing the resignation by the authority appointed to receive it, constitutes an acceptance and answers the common law requirement of that ceremony."

As further authority for this proposition of implied acceptance of the resignation there is cited:

Mechem on Public Officers, Sec. 415.

Gates v. Delaware Co., 12 Iowa, 405.

Upon the foregoing authorities, then, it may be argued that the mere fact of the presentation by the Mayor of the letters of resignation from the six members of the school board was in itself an implied acceptance of the said resignations. The mere fact that the resigning members continued to hold office and perform the duties of members of the School Board would be in no wise significant in that it is always the duty of public officers whose terms have expired to hold office until the appointment and qualification of their successors. As authority for this proposition, we cite the case of *The People ex rel. v. The Supervisors of Barnett Township*, 100 Ill. 332.

The weakness of this argument lies in the fact that the response of the Mayor to the letter of resignation is not an acceptance of the resignation in affirmative terms. Attention is called to the following language of the communication:

“Under these circumstances, I cannot accept the proffered resignations of the six who are willing to make the sacrifice, and in that way cast reproach upon their services while I had no thought of attempting to place any blame whatever upon any one.

“I hope that those members who are withholding their resignations will yet, for the public good, abandon their opposition to the restoration of harmony, and place their resignations in my hands so that I can appoint an entirely new Board as intended.”

While it can be argued that the foregoing language constitutes a refusal to accept the resignations at that particular time, it is equally clear that there was not a definite refusal to accept these resignations. At the most, there was a mere statement that the resignations would not be accepted until the three remaining members had tendered their resignations. The intention is made perfectly patent that the resignations were to be kept open, and that the Mayor intended to accept the resignations of the entire Board as soon as the resignations of the remaining members were placed in his hands.

If then, the action of the Mayor at that time is to be considered as neither a refusal nor an acceptance, the question arises as to the present legal status of these resignations.

Several states have held that when once a resignation has been tendered by a public officer to the person or authority competent or proper to receive it, such resignation cannot be withdrawn pending acceptance. Thus, in the case of the *State ex rel. v. Hauss*, 43 Ind. 105, the court, at page 107, said:

“Our conclusion is that when an officer has transmitted his written resignation of an office to, and it has been received by, the officer or authority appointed by law to receive it, to take immediate effect, he cannot withdraw it, and that there is a vacancy to be filled by the proper authority.”

The following citation is taken from 19 A. & E. Cyc., page 562u:

“A resignation which has been accepted, cannot be withdrawn, *nor can a resignation which is intended to take effect immediately, and which has been delivered for that purpose to the officers authorized to receive it.*”

The following authorities are also cited:

Mechem on Public Officers, Sec. 417.

Reg. v. Wigar, 14 Q. B. D. 908.

State v. Hauss, 43 Ind. 105.

State v. Clarke, 3 Nev. 566.

State v. Fitts, 49 Ala. 402.

On this authority it is a *sequitur* that if the public officer himself may not withdraw his resignation, the mere fact that there has been a lapse of time cannot *ipso facto* result in a revocation of the offer. The offer remains open until definitely accepted or refused by the person or authority to whom made.

The mere fact that the resignation was made to a former Mayor of the City of Chicago, instead of the present Mayor of the City of Chicago, bears in itself no legal significance, for it is the office and not the person to which the resignation is made.

Mechem on Public Officers, Sec. 6.

An answer which might be made to the foregoing argument is that the Mayor has delayed unreasonably in accepting the said resignations, and his laches in so doing constitutes a bar to his acceptance of them at the present time. As authority for such a contention, there might be cited such cases as *Jacobsen v. City of Chicago*, 191 Ill. App. 511, where it was held that when the appointee of a public office had been removed and delayed for a period of over 15 months the filing of a writ of mandamus for his reinstatement, the writ should be denied because an unreasonable period of time had been allowed to elapse before the appointee attempted to claim the office. Thus it might be argued that here an analogous situation was presented, viz., that the City of Chicago had delayed for an unreasonable time in accepting these resignations and was now barred by laches. The answer to such a contention would be that the Mayor of the City was not negligent in failing to act upon the resignations, because he was waiting to receive the resignations of the remaining members of the Board and it was his intention to act promptly in accepting all the resignations as soon as those remaining resignations were presented to him.

In conclusion, therefore, it is the opinion of the Corporation Counsel that the resignations heretofore tendered, as aforesaid, on June 5, 1922, were neither accepted nor refused at that time or at any subsequent time by the Mayor of the City of Chicago; that in legal contemplation the said resignations remained open and pending for the reason that having once been made, they could not be withdrawn; that the time has now arrived when it is advisable to accept the said resignations because the terms of the remaining members of the board have now expired; and that it is now your Honor's privilege to accept these resignations as of the present date, and appoint an entirely new Board.

Respectfully submitted,

FRANCIS X. BUSCH,
Corporation Counsel.

Assignment of Void Lease on Municipal Pier.

May 18, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have requested the Corporation Counsel for an opinion as to the legal effect of the assignment of a lease heretofore entered into between the City of Chicago and Henry J. Kramer to the Pageant of Progress.

We refer you to an opinion previously rendered you on May 10, 1923, in which we held that the lease between the City of Chicago and Henry J. Kramer was null and void. In view of that holding, since the lease was void from its inception, the assignment of the alleged lease whereby Kramer purported to assign his interest to the Pageant of Progress could not operate to assign any greater right, title or interest than the said Henry J. Kramer himself had. Since the said Kramer had no right, title or interest in the said premises under this void lease nothing could pass by the assignment. As we have before advised you the lease to Kramer is null and void, and the lease between Kramer and the Pageant of Progress is null and void, and, therefore, of necessity the assignment is null and void and is of no legal force or effect whatever.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**City May Not Require Compensation for Maintenance
of Vault Under Street When Fee is in
Abutting Land Owner.**

Chicago, May 18, 1923.

HON. FRANCIS X. BUSCH, Corporation Counsel.

Dear Sir:

On January 22, 1922, a declaration was filed by the City of Chicago in the case of *City of Chicago v. Frederick Ayer et al.*, Superior Court of Cook County, No. 373836. This suit was brought on a bond signed by the said Frederick Ayer and on which the Fidelity and Deposit Company of Maryland was surety, which had been filed with the City Clerk of the City of Chicago in consideration of being permitted to construct and maintain a vault under the surface of an 18 foot east and west public alley in connection with the building to be erected on Lots 5 and 6, Block 81, School Section Addition to Chicago.

The bond was conditioned on the promise of the said Frederick Ayer to close up the said vault within ten years from the date of the permit to open same. That time having expired and the licensee having refused to close the said vault, this suit was instituted upon the bond. The vault as constructed does not interfere in any way with the use of the alley by the public as a street. It is submitted that the City of Chicago has no legal claim or right to maintain an action upon this bond. In the case of *Sears v. City of Chicago*, 247 Ill. 204, the Supreme Court held that the plat of the School Section Addition to Chicago has not been filed in accordance with the statute then in force and amounted to merely a common law dedication, and that, therefore, the City had only an easement in these streets and alleys and the fee remained in the abutting lot owners. The court in this case further held that the abutting lot owner need not pay the City compensation for the use of sub-sidewalk space

in these streets, provided said use is not inconsistent with the public easement in the street. The facts in the *Sears* case were precisely the same as the facts are in the case at bar. The bond, therefore, is void for failure of consideration. The mere fact that the bond was under seal does not supply consideration because Section 9 of Chapter 98 of Smith's Illinois Revised Statutes for 1912 provides in substance that in any action upon a bond for the payment of money that if such instrument was entered into without a good and valuable consideration, or if the consideration upon which it was made or entered into has failed, that a defense to any action upon the said bond is thereby constituted.

Therefore, in view of the fact that the Supreme Court of Illinois has passed upon precisely this very question in the *Sears* case, quoted *supra*, it is respectfully recommended that the City of Chicago should dismiss the above mentioned suit.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Spreading of Special Assessments for Trifling Amounts.

May 22, 1923.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

We are attempting to accomplish something in the way of overcoming losses from delinquent special assessments, a subject which requires attention and with which you are greatly concerned.

The City's real estate agent, Mr. Peacock, sent in a request to have a bill prepared for presentation to the legis-

lature authorizing the city collector to hold current installments of special assessments where the amounts are small until the final installment is due. His proposal also included a plan for collecting a penalty each year that an installment was held.

We felt that the plan was impracticable—that if an attempt was made to extend a forfeiture each year it would conflict with the very changes that are now being urged discontinuing the bringing forward of forfeitures. If no forfeiture was entered the installment would not be paid until they had all matured. There are other reasons why we do not regard the plan as feasible, but we need not enlarge on these, because we have already stated to the real estate agent that we will not adopt his suggestion.

The old point that keeps on constantly coming up, however, was immediately thrust to the front when the deputy city collector was called in to discuss the matter from the standpoint of the collector's office. That point is that the great bulk of all the trouble over this subject is due to the very small assessments. We have in times past called the attention of various city officers to this feature of the difficulties we encounter, but up to the present time nothing has been done to overcome the objections we have urged. This letter is written with a view to getting co-operation from you in the matter.

To us it seems an absurd proposition to extend special assessments of such small amounts that the cost of collection is bound to exceed the amount collected. We understand this results automatically sometimes by reason of the methods used in spreading the assessment and that the low value of certain pieces of property at certain distances from the improvements tends to bring this about. While this may be true, there is nothing in the law which requires a tapering off to so fine a point. There was at least one case—perhaps more—when the legal description that had to be entered on the books covered 15 or 16 lines and the installment extended against it was one cent.

From all we can gather relating to this subject, we are certain that there are thousands of items put upon the books each year which become delinquent, upon which we pay more than the entire item to go through the cost of advertising, judgment, sale, etc., the City's expense in such event being at least thirty-nine cents.

We are convinced that a full understanding of the situation on your part will bring about some reform in this respect, and we trust you will accept our suggestion and act with us to that end.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Status of Civil Service Position of "City Engineer"—
Reinstatement of Mr. Ericson to Said Position.**

May 22, 1923.

HON. NICHOLAS R. FINN, President, Civil Service Commission.

Dear Sir:

I have your letter of the 21st instant informing me that demand has been filed in your office by Mr. John Ericson for reinstatement to the position of City Engineer, and advising me as to the records concerning Mr. Ericson's examination, appointment and service.

As I understand the facts, Mr. Ericson never took but one Civil Service examination, and that was for the position and place of employment of City Engineer. This examination was held January 12, 1898. Mr. Ericson passed first on the list and was appointed April 1, 1898. On April

30, 1919, the Civil Service Commission approved the request of the Commissioner of Public Works to change the title to the position held by Mr. Ericson from "City Engineer" to "Consulting Engineer to the Commissioner of Public Works." From that time until the present date Mr. Ericson has been carried on the rolls as "Consulting Engineer to the Commissioner of Public Works," drawing the same salary that he theretofore received as City Engineer.

I have also been given to understand that since April 30, 1919, Mr. Ericson has performed such duties as have been assigned to him from time to time by the Commissioner of Public Works, which duties, however, were not identical with the duties theretofore performed by the City Engineer. It is also my understanding that at least since April 30, 1919, the duties theretofore performed by the City Engineer have been performed by other persons employed either under temporary authority or by certification from the Civil Service Commission.

I am also informed that shortly prior to February 14, 1921, a Civil Service examination was held for City Engineer, and that one Alexander Murdock passed first in said examination and upon a requisition from the Commissioner of Public Works dated February 2, 1921, Mr. Murdock was on February 14, 1921, certified from this list to the Commissioner of Public Works for appointment to the position of City Engineer, and that Mr. Murdock by reason of such appointment has been serving as City Engineer from that time until May 17, 1923, when he was suspended by the Commissioner of Public Works pending the filing of charges.

I am further informed that Mr. John Ericson never at any time consented to the change of title above referred to, and never at any time consented to be relieved of the duties of City Engineer; on the contrary, the fact appears to be that Mr. Ericson at all times protested against doing anything, or suffering anything to be done, that would in any way alter his status in the classified Civil Service of the City of Chicago, to wit: that of City Engineer.

Under the law, the position of City Engineer is a position in the classified Civil Service, which can only be filled as the result of a Civil Service examination held pursuant to the Civil Service Act and the rules adopted in pursuance thereof. Under the Civil Service Law, after an eligible has been certified to a position in the classified service, there is only one way by which he can be removed from the service without his consent, viz.: after a trial and conviction upon charges preferred to the Civil Service Commission by the head of the department in which he is employed.

Under the law, the Civil Service Commission has no right to create a new position; neither has the head of any one of the principal departments of the City of Chicago a right to create a new position or office. The right to create an office or position rests solely with the City Council, and if the City Council creates a new office or position which under the terms of the Civil Service Law is not exempt from the operation of that law, such newly created office or position must be filled by a Civil Service examination.

In contemplation of law, there never was any such office, position or place of employment as "Consulting Engineer to the Commissioner of Public Works." It is, of course, clear under the law that before a legal certification can be made from a Civil Service list of eligibles for appointment to an office, position or place of appointment, a *vacancy* must exist in such office, position or place of employment. Mr. Ericson never resigned the office of City Engineer, and no charges were ever preferred against Mr. Ericson to remove him from the office of City Engineer. Regardless of whatever attempt may have been made to change the title to the office or position previously held by Mr. Ericson, or to create a new position or place of employment, the fact remains that Mr. Ericson has never held, nor under the Civil Service Law was he ever qualified to hold, any position other than that of City Engineer. Under the law he has at all times since April 1, 1898, been the incumbent of the office, position and place of employment of City Engineer of the City of Chicago. This being so, no vacancy has existed in the office of City Engineer

since April 1, 1898, and no vacancy in such office existed either on February 2, 1921, or on February 14, 1921. Therefore, the attempted certification of Mr. Alexander Murdock to the office or position of City Engineer on February 14, 1921, was entirely without legal effect, because no vacancy existed in that office or position.

From the foregoing I am clearly of the opinion that Mr. Ericson is now, and has since April 1, 1898, been the legally appointed and qualified City Engineer of the City of Chicago; that the attempted change of his title from that of City Engineer to Consulting Engineer to the Commissioner of Public Works was entirely without legal effect; that the certification of Alexander Murdock to the position of City Engineer on February 14, 1921, was of no effect, because no vacancy existed in the office and position of City Engineer.

I am further of the opinion, and I recommend, that the Commissioner of Public Works and the Civil Service Commission recognize Mr. John Ericson as City Engineer of the City of Chicago, and that the name of Alexander Murdock should be restored to the list of eligibles of City Engineer, provided such a list still exists.

I am further of the opinion that the action taken by the Commissioner of Public Works on May 17, 1923, in suspending Mr. Murdock was unnecessary, inasmuch as Mr. Murdock was not then, nor has he ever been, the legal incumbent of the office or position of City Engineer. It is therefore not required that any charges should be preferred against him.

In order that the minutes of your Honorable body may show a satisfactory record in this matter, I would suggest that an epitome of this decision be incorporated into your minutes with a statement of your adoption of and reliance upon it (if you care to adopt and rely thereon) and that the Commissioner of Public Works be notified accordingly.

Respectfully submitted,

FRANCIS X. BUSCH,

Corporation Counsel.

**Repeal of Former Ordinance for Employment of
Special Counsel to Represent City in Litiga-
tion Against Surface Lines and Telephone
Company, and Substitution of More
Economical Ordinance.**

May 22, 1923.

TO THE HONORABLE, THE CITY COUNCIL
OF THE CITY OF CHICAGO:

Gentlemen:

I transmit herewith two ordinances; one repealing an ordinance passed by Your Honorable Body on May 3, 1920, providing for the employment of two attorneys at \$150 per day, one at \$125 per day, and four at \$50 per day, to represent the City of Chicago in connection with litigation regarding the rates of fare on surface and elevated lines in the City, and also fixing the compensation of real estate experts employed for the purpose of fixing valuations in connection with said litigation at the rate of \$50 per day for any valuation amounting to not more than \$10,000, and at the rate of \$2 per \$1,000 of the price fixed for valuations from \$10,000 to \$30,000, and at the rate of \$1 per \$1,000 of the price fixed for valuations exceeding \$30,000; also an ordinance repealing an ordinance passed by Your Honorable Body on May 3, 1920, fixing the compensation of special counsel to represent the City of Chicago in connection with the litigation regarding rates and charges of the Chicago Telephone Company as follows: Two assistant corporation counsel at \$150 per day each; one assistant corporation counsel at \$125 per day; two assistant corporation counsel at \$50 per day each, and also fixing the compensation of an engineer employed in connection with said litigation at the rate of \$100 per day.

I also transmit to you herewith an ordinance providing for the employment of one special assistant corporation coun-

sel at a rate not exceeding \$125 per day; two special assistant corporation counsel at the rate of \$5,000 per annum; two special assistant corporation counsel at the rate of \$3,600 per annum; who will, when selected, represent the City in connection with the litigation regarding the rates and charges of the Illinois Bell Telephone Company. The ordinance also provides for the employment of three law clerks at the rate of \$2,400 per annum, and authorizes the Corporation Counsel to employ from time to time such expert engineering service as may be required, and to charge the same, together with the other expenditures provided for herein to Account 16-S-10.

Your Honorable Body provided in the Annual Appropriation Bill for the year 1923 an appropriation of \$40,000 to be expended under the direction of the Corporation Counsel. There has already been expended out of this appropriation the sum of approximately \$11,500, leaving a balance of approximately \$28,500 on hand.

I desire to advise Your Honorable Body that there is a hearing now pending before the Illinois Commerce Commission in connection with the rates to be charged by the Telephone Company to its subscribers, and it will be necessary for the City of Chicago to continue to be represented at this hearing and to produce such evidence as may be possible in order to secure the lowest possible rate for telephone subscribers.

In addition to the rates and charges of the Illinois Bell Telephone Company, there are several other important technical matters involved in this case; such as the payment of $4\frac{1}{2}$ per cent of the gross receipts of the Illinois Bell Telephone Company to the American Telephone & Telegraph Company; methods of operation; valuation; capitalization, etc., and, in addition to the above litigation, the Interstate Commerce Commission, acting under a provision of the Federal Transportation Act, has initiated an original proceeding in the matter of prescribing the rates of depreciation to be charged by all carrier companies. For some reason, the Interstate

Commerce Commission has seen fit to select telephone companies as one of the first class of carriers for which it will undertake to fix rates of depreciation.

You will readily understand that if this procedure by the Interstate Commerce Commission succeeds, and if an order should be entered by them fixing the rates of depreciation of telephone companies, such ruling by the Interstate Commerce Commission will be conclusive on all telephone companies throughout the United States, including those in our own City, and no contrary finding by the Illinois Commerce Commission would have any effect.

It is, therefore, of the utmost importance that the City of Chicago should be represented at the hearings before the Interstate Commerce Commission so that every effort may be made by us to present evidence and arguments to convince the Interstate Commerce Commission that the matter of fixing the rates of depreciation for telephone companies should be left to the municipal and State authorities of the respective commonwealths in which the utility may be operating.

The sum of \$28,500 now available for utility litigation is not enough to enable this department to properly represent the City in this important utility litigation for the remainder of the year, and I respectfully recommend that a supplemental appropriation be made to be set up under Account 16-S-10 to be expended under the direction of the Corporation Counsel.

The ordinance, fixing the compensation of special counsel to represent the City of Chicago in connection with litigation regarding the rates and charges of the Chicago Telephone Company, which I am asking you to repeal, provides for the employment of two assistant corporation counsel at \$150 per day each, one assistant corporation counsel at \$125 per day, and two assistant corporation counsel at \$50 per day each, and fixes the compensation of an engineer employed in connection with said litigation at the rate of \$100 per day, and also permits the expenditure of approximately \$187,500 per annum, while the ordinance I am requesting you to

pass as a substitute, and which provides for the payment of all but one special counsel on an annual basis, will not permit of the expenditure of more than \$50,000 per year. The passage of this ordinance will, therefore, enable me to efficiently prosecute the said litigation on a more economical basis than in the past.

I, therefore, recommend the prompt consideration of the ordinances referred to in this connection by Your Honorable Body.

Yours respectfully,

FRANCIS X. BUSCH,
Corporation Counsel.

Construction of the "Dry Cabaret Ordinance."

May 22, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

For your information, we have prepared a somewhat detailed opinion covering the question of licenses required by cabarets and restaurants permitting dancing. This opinion is not intended to meet any particular situation, but is simply offered for your information in dealing with the general subject.

The so-called "Dry Cabaret Ordinance" (Chi. Mun. Code 1922, Sec. 202) provides: "The term 'public place of amusement,' as used in this article, shall be construed to include and to mean any building, hall, room, place or enclosure, where food or drink is served, to which the general public may be admitted either with or without the payment of a charge or admission fee, where such public may engage in or witness the performance of any theatrical entertainment, exhibition, show, amusement, dance, skating, or entertainment, other than musical." It seems this provision is free of ambiguity and needs no construction; that the giving of any entertainment other than a musical entertainment

constitutes the premises in which given "a public place of amusement."

But if it be conceded the meaning of the words "other than musical" is not clear, the doctrine of "last antecedent" requires that "musical" be construed as qualifying the word entertainment. Relative and qualifying words must ordinarily be referred to the next or last antecedent unless a consideration of the whole act requires the contrary. (*City of Traverse City v. Blair Two.*, 190 Mich. 313, 323; 36 Cyc. 1223, citing cases.)

The "musical entertainment," however, which is excluded from the definition of a public place of amusement must be some entertainment other than those prohibited or those used in the definition of a public place of amusement. Effect will be given if possible to every word, clause and sentence in the statute. Accordingly, meaning must be given to the words theatrical entertainment, exhibition, dance, etc. If they are given meaning, then the only kind of musical entertainment which may be given without constituting the place a "public place of amusement" is one that is not a "theatrical entertainment," and "exhibition," a "show," a "dance," "skating." Any musical entertainment that does not include these may be given at a restaurant.

The ordinance is valid. The validity of it was passed upon in *Chicago v. Green Mill Gardens* (305 Ill. 87). It was there held that the City had the power to enact it and that it was not unreasonable. In that case it was contended the Legislature did not intend by authorizing cities to regulate places of amusement to include places where food and soft drinks were served. The court admitting this might be true, said the keeper of the restaurant had done more than that; that it had permitted dancing to the music of an orchestra and so had brought the place within the definition of a public place of amusement as prescribed by the ordinance. Having done so, it was subject to the regulations of the ordinance.

In support of the contention that the City is without power to regulate by license or otherwise a restaurant in which dancing is permitted, the case of *Chicago v. Drake*

Hotel Co., 274 Ill. 408, is most frequently cited. This case was decided before the "Dry Cabaret Ordinance" was passed. That case was decided on the theories that there is no police power to prohibit amusements altogether; that there is no power to prohibit dancing in a restaurant where no fee is charged and that the keeper of a restaurant cannot be compelled to charge a fee. But it was specifically said (p. 412): "The question whether the City Council has the power to regulate dancing in such restaurants is not presented."

In *Chicago v. Green Mill Gardens, supra*, it is said, p. 94: "This conclusion necessarily leads to the further conclusion that such amusements ought to be and may be subjects of regulation by cities and villages. It is clear also that the State does give them power to regulate such amusements."

It is to be noted that since *Chicago v. Green Mill Gardens, supra*, was decided the ordinance has been amended so as to apply to places where food or drink is served. Since the ordinance applies not only to places to which an admission fee is charged, but also to those where no fee is charged, the doctrine of *Chicago v. Drake Hotel Co., supra*, in our opinion, does not apply.

We do not think that there is any conflict between the *Drake* case and the *Green Mill Gardens* case but suggest that if any of the so-called cabarets carry out their intention of insisting that they come within the decision of the *Drake Hotel* case and simply conduct a restaurant in which dancing is permitted an arrest should be made upon the theory that such place is being operated without a public amusement license, as required by the so-called Dry Cabaret Ordinance. We believe in such a situation the courts would be compelled to hold, under the authority of the *Green Mill Gardens* case, that the City has the right to regulate dancing in such restaurants, which it has done, by requiring such restaurants to take out a public amusement license.

This for your information.

Very truly yours,

FRANCIS X. BUSCH,

Corporation Counsel.

**Amendment to Smoke Ordinance to Permit Violator
Choice of Giving Bond to Health Department on
Second Offense Instead of Being Sued for
Violation of Ordinance.**

May 23, 1923.

HONORABLE HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

You have requested an opinion from the Corporation Counsel as to the legality of a proposed plan which contemplates offering the violator of Section 2129 of the Chicago Municipal Code of 1922, a choice, on being reported for a second offense, of depositing a one hundred dollar bond with the Health Department to be forfeited if a subsequent violation occurs within a given period, or of being sued for the said violation.

Section 2129 of the code is as follows:

2129. *Emission of dense smoke—regulations—abatement—penalty.*) The emission of dense smoke within the city from the smoke stack of any locomotive, steamboat, steam tug, steam roller, steam derrick, steam pile driver, tar kettle or other similar machine or contrivance, or from the smokestack or chimney of any building or premises, except for a period of six minutes in any one hour during which the fire box is being cleaned out or a new fire being built therein, is hereby declared to be a nuisance and may be summarily abated by the commissioner of health or by anyone whom he may duly authorize for such purpose. Such abatement may be in addition to the fine hereinafter provided. Any person, firm or corporation owning, operating or in charge or control of any locomotive, steamboat, steam tug, steam roller, steam derrick, steam pile driver, tar kettle or other similar machine or contrivance, or of any building or premises, who shall cause or permit the emission of dense

smoke, within the city, from the smokestack or chimney of any such locomotive, steamboat, steam tug, steam roller, steam derrick, steam pile driver, tar kettle, or other similar machine or contrivance, or from the smokestack or chimney of any building or premises so owned, controlled or in charge of him or it, except for a period of six minutes in any one hour during which the fire box is being cleaned out or a new fire being built therein, shall be deemed guilty of a violation of this section, and upon conviction thereof shall be fined not less than ten dollars nor more than one hundred dollars for each offense; and each emission of dense smoke in violation of the provisions of this section shall constitute a separate offense for each and every day on which such violation shall continue."

We respectfully call your attention to the fact that the foregoing section of the Municipal Code provides for a penalty upon conviction of the violation of the section. Since a penalty is prescribed by the code, no other penalty, such as the depositing of a bond with the department to be forfeited for a subsequent violation, can be required by the Commissioner of Health, for the commissioner is an administrative officer and must enforce the law as he finds it. It is not his prerogative to vary in any manner or method the provisions of the code. Such a proceeding would be tantamount to a legislative act by an administrative officer, and is forbidden by the Constitution.

U. S. v. Matthew, 146 Fed. 206.

Gilhully v. Elizabeth, 66 N. Y. L. 484.

State v. Taylor, 27 N. D. 77.

Field v. People ex rel., 2 Scam. (Ill.) 79.

Therefore, should this plan be adopted, it must be done by an amendment to the above quoted section of the code.

It is noted that the proposed plan contemplates offering the violator a choice on being *reported* for a second offense, of depositing a bond or of being sued. Since the depositing of a bond, provided the ordinance authorizes it, would amount to a penalty for a violation, such penalty could only be im-

posed after a conviction had been obtained in open court; otherwise the Commissioner of Health would be arrogating to himself the functions of a judicial officer and thus encroaching upon the judiciary—which is also forbidden by the Constitution.

Evans v. Nate, 62 Ala. 195.

Gregory v. Grace, 94 Ind. 384.

Gow v. Bingham, 57 Misc. (N. Y.) 66.

Rochelle v. Lane, 105 Tex. 350.

The only way in which the plan which you proposed could be adopted would be to have an ordinance passed providing, that upon a conviction for a violation of Section 2129, the violator, in the discretion of the trial judge, could be fined for the violation as heretofore provided in the present section of the code or could be required to deposit a one hundred dollar bond with the clerk of the court to be forfeited for a subsequent violation; and that for each violation subsequent thereto the first bond should be forfeited and a further choice then offered, in the discretion of the judge, of being fined or depositing another one hundred dollar bond. It is submitted that while the City Council under Section 100 of the Cities and Villages Act has the power to put into force such penalties as are reasonable and necessary to punish violators of valid city ordinances, nevertheless such a system as the above proposed plan would be very clumsy and difficult of application, would involve clerical work and details of bookkeeping, for which the clerks of the Municipal Court are not well prepared, and would in general be impracticable. However, if it is desired, an ordinance can be prepared along the lines above indicated.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Authority of Building Department to Require Permits for Tents.

May 25, 1923.

HON. CHAS. BOSTROM, Commissioner of Buildings.

Dear Sir:

Answering your inquiry concerning application made to your department to O. K. a license for an outdoor amusement to be conducted at the corner of 38th street and St. Louis avenue, consisting of various "walk-around shows" and riding devices located in tents, you are correct in stating that the building ordinances do not include tents of this kind where no masonry is involved. Nowhere in the building ordinances is authority vested in your department covering permits for such tents and your department is, therefore, without authority to refuse permission for the maintenance of such tents on vacant lots.

We have gone into all phases of this particular situation in connection with outdoor amusements. Your office has referred us to the opinion of Max Korshak, Assistant Corporation Counsel, rendered June 5, 1911, which we have carefully read. This opinion, like the building ordinances, has no reference to tents such as are contemplated in the inquiry before us.

In the opinions of the corporation counsel, the same Mr. Korshak at a later date, that is, on July 2, 1915, clearly suggested the law covering such temporary tents as are contemplated in your inquiry of recent date, distinguishing between a permanent structure and a temporary tent. In a recent opinion of the corporation counsel the law was clearly stated to be that your department has no jurisdiction in the

matter of tents which are erected in the Manhattan Beach line during the summer months. The corporation counsel stated in his opinion July 2, 1915, that because these tents are all removed at the end of three or four months and are of such temporary character, they do not come within any of the classifications contained in the building code.

Any other construction would prevent individuals from sleeping in tents in their back yards unless permits were first secured and unless the tents complied in every way with the building regulations as to exits, ventilators, and so on, and which very clearly apply only to permanent structures.

And if tents which are to be removed at the end of a three or four month period are of too temporary a nature in the clear meaning of the law and ordinances to come within the jurisdiction of your department, obviously tents which are to be removed at the end of a week are therefore more temporary in character and are beyond the contemplated scope of the building ordinances.

Your department is, therefore, without jurisdiction under the well settled legal principle that tents were in common usage at the time the ordinance was enacted and if tents were in the contemplation of the City Council at the time the building ordinance gave you jurisdiction over them they would have been specifically included in the ordinance. Of course, every permit necessary for a public place of amusement must be obtained if the applicants wish to conduct a show of any kind as contemplated in your inquiry, and they would come under the 22d class listed in Article 1, Chapter 8 of The Chicago Municipal Code of 1922.

Yours truly,

LEONARD J. GROSSMAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Construction of Ordinance Requiring Frontage Consents for Undertaking Establishment and Morgue
—Status of Sheridan Road as a Boulevard.**

May 25, 1923.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Déar Sir:

We are in receipt of your letter of May 19th, asking for the opinion of the Law Department as to whether it will be necessary for the Western Undertaking Company, which is about to establish an undertaking parlor at the southeast corner of Broadway and Devon avenue, to secure frontage consents before a license could issue for an undertaking parlor and morgue. Section 1902 and Section 931 of The Chicago Municipal Code are identical and constitute the municipal requirements governing a morgue and undertaking establishment in the City of Chicago. Both sections are as follows:

“It shall be unlawful for any person, firm or corporation to establish or maintain a morgue or to carry on the business of an undertaker as defined in this article, that receives, in connection with such business, at his or its place of business, the body of any dead person for embalming or other purposes, on or along any boulevard or pleasure driveway, without the written consent of a majority of the property owners according to the frontage on both sides of such boulevard or pleasure driveway in the block in which such morgue or place of business is located; it shall also be unlawful for any person, firm or corporation to establish or maintain a morgue or to carry on the business of an undertaker, as defined in this article, that receives, in connection with such business, at his or its place of business, the body of any dead person for embalming or other purposes, on or along any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes without the written consent of a majority of the property owners according to the front-

age on both sides of such street in such block; provided that nothing herein contained shall apply to such location in the case of any person licensed as an undertaker and authorized to carry on such business at any such location at the time of the passage of this ordinance, nor to any block in any street on which street cars are operated. Such frontage consents shall be obtained and filed with the department of health before a license shall issue for such business."

It will be observed from the foregoing section of the code that it is only necessary to obtain frontage consents for an undertaking establishment or morgue when it is proposed to establish such a business on or along any boulevard or pleasure driveway or on or along any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes.

The file submitted to us would show that there is some misapprehension in regard to the status of Sheridan road from the north line of Devon avenue to Loyola avenue. There is also probably a general public belief that that section of Sheridan road is a boulevard or pleasure driveway. An examination of the ordinances shows that by an ordinance passed March 18, 1901, Sheridan road from the north boundary of the City of Chicago, going south to the northerly line of Hayes avenue (now Loyola avenue), was transferred to the Board of Commissioners of the North Shore Park District. It further appears that on July 22, 1912, an ordinance was passed turning over to the Commissioners of Lincoln Park and thereafter created by them into a boulevard, all of that part of Sheridan road from the north line of Foster avenue, northward to the north line of Devon avenue.

There are no other ordinances which affect Sheridan road from the north line of Devon avenue to the north line of Loyola avenue, so far as any park commissioners are concerned, and we find no ordinance making that part of Sheridan road a pleasure driveway. For that reason, we beg to advise you that Sheridan road, from the north line of Devon avenue to the north line of Loyola avenue, is neither a boulevard nor pleasure driveway, and in view of the fact that it

further appears from the files submitted in that case, that two-thirds of the buildings on said block are not used exclusively for residence purposes, we are of the opinion that the above quoted Sections 931 and 1902 do not apply to the Western Undertaking Company in its proposed establishment of an undertaking parlor at the southeast corner of Broadway and Devon avenue, and therefore beg to advise you that in our opinion a license may be properly issued without obtaining frontage consents.

Very sincerely yours,

JOSEPH R. W. COOPER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Supplying Districts Outside of the City Limits With City Water.

May 25, 1923.

HON. WM. E. DEVER, Mayor.

Dear Sir:

Some time ago, a bill was introduced in the Legislature which proposed a sort of co-operation between the City and the Sanitary District for the purpose of supplying the metropolitan area outside of the limits with water. The bill has been tabled but it brings up a matter of great importance to the City which we deem it our duty to call to your attention, because there is a possibility of the Legislature acting at some future session regardless of what the City has done unless the question is taken up for consideration in the meanwhile.

The City will be compelled sooner or later to face the question of supplying water to the district beyond its limits,

but within the metropolitan area of Chicago. Municipalities to the north have access to the lake, but those to the west and south will be compelled before long to get water from Lake Michigan, and it will then be necessary for them either to tunnel underneath the City or obtain water from the City. In either event, the City is deeply interested.

Within the last 25 or 30 years, there were a number of artesian wells in Chicago, all of which have gone dry. The Corn Products Company, southwest of the city is pumping ten millions of gallons of water a day for its needs. The growth of the population and industrial plants to the west and south of the city has been enormous, and the question of getting water is a very serious one. The population surrounding Chicago is now approximately one-third of a million, and within the next 10 or 15 years will probably be more than one-half million, and if the cry for water goes up from such a large number of people the Legislature will undoubtedly give heed to it.

The City's engineers aim to keep 15 or 20 years ahead in planning the City's water supply. You are aware of the fact that the South West Land and Lake Tunnel, which has only recently come into use was projected more than 20 years ago; the same thing might be said with reference to the Wilson Avenue Tunnel. From these facts, it must be plain to you that the question of supplying water to the metropolitan area of Chicago is one that calls for prompt attention on the part of the City. The Law Department probably will not be called upon to do anything in the matter after making this suggestion until some tentative plan has been worked out that will require the consideration of this department. Nevertheless, we make this suggestion at this time in order that proper and timely action may be taken in case the ideas expressed herein appeal to you.

Yours very truly,

LEON HORNSTEIN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Fixed Bridges Over the Chicago River Are Not Prohibited by the Virginia Act of Cession, the Continental Ordinance of 1787, or the Act of Congress of 1818.

May 25, 1923.

HON. GUY GUERNSEY, Chairman, Committee on Harbors, Wharves and Bridges.

Dear Sir:

During the discussion, at the last meeting of your committee, on the question of substituting fixed for movable bridges over the Chicago River, a citizen stated that the substitution could not be made under the law.

At the request of Alderman Powers I have examined the grounds upon which this conclusion was advanced. These, in substance, were that such substitution would be in contravention of:

First: The Act of Cession by Virginia of its claim to the territory northwest of the Ohio;

Second: The Continental Ordinance of 1787, relating to the organization and government of said territory; and

Third: The Act of Congress of 1818, providing for the admission of Illinois into the Union.

My examination shows that neither the Virginia Act of Cession (1783) nor its deed of Cession (1784) contain any condition relating to waterways in the ceded territory or to any reservations by Virginia of any control thereover. To the contrary, the Cession Act expressly stipulates that all states that later may be formed out of the territory and be

admitted into the Union shall be admitted on a basis of equal sovereignty with the original states.

The remaining two points can best be considered together.

The Ordinance of 1787, Article IV, contains the following clause:

“The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, and to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, import or duty therefor.”

and the Congressional Act of 1818 (providing for the admission of Illinois), stipulated, among other things, that the Illinois constitution should not conflict with the provisions of the clause last quoted. If the provisions of said clause were still in effect it would simply require Federal approval of fixed bridges over the Chicago River and irrespective of this clause I assume it is recognized that Federal approval is necessary. However, the United States Supreme Court has held that the Ordinance of 1787 relating to territorial control ceased to affect Illinois upon its admission into the Union as a sovereign state.

The court declared this view in a case concerning the Chicago River and the right of the City to enforce closed bridge periods. The case is that of *Escanaba Company v. Chicago*, 107 U. S., page 687, and from it I quote the following portion of the opinion:

“The ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and although it appears to have been treated afterwards as in force in the territory, except as modified by Congress, and by the Act of May 7, 1800, c. 41, creating the Territory of Indiana, and by the Act of February 3, 1809, c. 13, creating the Territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those territories;

and although the Act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a constitution and State government, and the resolution of Congress of December 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinances according to which the constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her, is on equal footing with the original States *in all respects whatever.* Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River."

I am, therefore, of the opinion that nothing contained in either the Virginia act or deed of Cession, the Continental Ordinance or the act relating to the admission of Illinois has any bearing on the question of the right of Chicago to substitute fixed for movable bridges and that any limitation or control of that right is to be found only in Federal provisions applicable alike to all states of the Union.

Yours truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Maximum Weight of Load on Motor Truck Permitted on City Streets.

May 25, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We are in receipt of your letter of May 12th, asking for an opinion concerning the maximum weight of a load on motor trucks legally permitted to be allowed on the streets of the City. Section 3 of Chapter 95A of the Illinois Revised Statutes, said chapter being "Motor Vehicle Act," provides as follows:

"The maximum gross weight to be permitted on the road surface through any two wheels on the same axle of any vehicle shall not exceed sixteen thousand pounds, nor shall exceed eight hundred pounds per inch of width of tire upon such wheels. *Provided, further*, that the gross weight, including the weight of the vehicle and maximum load of any self-propelled vehicle shall not exceed twenty-four thousand pounds; and the gross weight, including the weight of the vehicle and maximum load, of any trailer or semi-trailer vehicle pulled or towed by motor vehicle shall not exceed thirty-two thousand pounds."

Paragraph 2 of the same section provides:

"Weight limits 50 per cent above those provided for herein may be permitted by ordinance in cities having a population of more than twenty thousand, but such increase shall not apply to vehicles when outside the limits of such a city."

You will note from the above quoted provision of the statute that the City is given authority to pass an ordinance which will permit weight limits on the streets of the City 50 per cent above those just quoted. In accordance with this authority, the following provisions are contained in The Chicago Municipal Code of 1922:

“Section 3862. It shall be unlawful for any person, firm or corporation to operate, or cause or permit any of his or its agents or employes to operate any motor truck on any pavement in the public streets or alleys of the City of Chicago, contrary to the provisions of this article and unless the same shall comply in all respects, as to equipment, size, weight, width of tires, weight of load, speed, and all other matters herein set forth, with the requirements of this article.”

Section 3863 provides:

“For the purpose of this article a motor truck shall be defined as a self-propelled vehicle commonly used for commercial purposes other than the transportation of passengers carrying its load as a single unit, with non-detachable propelling power, equipped with tires of rubber or some material of equal resiliency.”

Section 3864 provides:

“All motor trucks operating on the pavements of any streets or alleys shall have tires of rubber or some material of equal resiliency of a width that will meet the requirements hereinafter provided.”

Section 3865 provides:

“No motor truck shall be so loaded or operated that the total weight of the portion of the vehicle and load combined resting upon any wheel of same shall exceed one thousand pounds for each inch of width of tire upon such wheel, and no such vehicle shall carry a load of such weight that the maximum gross weight of vehicle and load combined shall exceed thirty thousand pounds, nor shall such load be so carried that the maximum gross weight of vehicle and load combined upon any axle of same shall exceed twenty-four thousand pounds.”

Section 3866 provides:

“No motor truck shall be operated on the streets or alleys of the city when the over-all dimensions exceed one hundred and two inches in width or forty feet in length.”

For your information, we have quoted both the sections of the statute and sections of the ordinance which have gen-

eral reference to the subject concerning which our opinion is asked. You observe from the foregoing that while under the statutes the total gross weight of the maximum load of any self-propelled motor vehicle shall not exceed twenty-four thousand pounds, that the city ordinances under the authority given, permit a maximum gross weight of vehicle and load which shall not exceed thirty thousand pounds, and further that where the gross weight on the same axle of the vehicle is limited by the statute to sixteen thousand pounds, under the city ordinance the maximum gross weight of vehicle and load combined upon any axle shall not exceed twenty-four thousand pounds, and you will further note that no motor truck is permitted to be loaded or operated so that the total weight of that portion of the vehicle and load combined resting upon any wheel of said vehicle shall exceed one thousand pounds for each inch of width of tire upon such wheel.

We believe that the foregoing statement completely conveys all the necessary information asked for to enable your department to act intelligently in the matter.

Very sincerely yours,

JOSEPH R. W. COOPER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Treasurer's Accounts of School and Library Funds.

May 28, 1923.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

In reply to your recent letters concerning the keeping of the accounts of the Board of Education and of the Board

of Directors of the Chicago Public Library in separate funds, we submit the following:

Under the School Act, as amended in 1917, it is provided that school moneys "shall be held by the city treasurer, *ex officio*, as school treasurer, in separate funds for school purposes, subject to the order of the board of education." It is also provided that the treasurer shall "keep his books and accounts concerning such moneys in such manner as may be prescribed by said board." (See Sec. 135.)

Under Section 189 of the School Act, the Board of Education is authorized to levy taxes for educational purposes, for building purposes, and for free text book purposes. There is a limitation as to each of these three taxes. There is also provision in the statutes for a playground tax and for a pension fund tax. There are, therefore, five separate accounts which must be kept by reason of the statutes. If the board of education, in making its demand for a tax levy, itemizes the same according to the statutes providing for these levies, it complies with the law. (*Koelling v. People*, 196 Ill. 353; *Otis v. People*, 196 Ill. 542.)

If the Board of Education saw fit to prescribe a further itemization for purposes of tax levy it could do so. It could also, under the provisions of Section 135 above quoted, require separation into subsidiary funds by the treasurer, if it saw fit. In the absence of any such direction on the part of the board, however, the treasurer need keep account of only such funds as the statutes prescribe and as were separately appropriated for.

In the case of the Public Library the same rule with respect to segregation of funds should be followed as in the case of other City funds. That is to say, there should be a separate account kept of each appropriation.

In recommending this course to you we are departing somewhat from the opinion rendered by the Law Department on June 28, 1915, which was also signed by the writer of this letter. At the time the opinion referred to was writ-

ten there had been in the appropriation ordinances a division into educational and building funds on the part of the Board of Education, but the Library Board had been appropriated for in one lump sum. In 1919 the Supreme Court, in *People, etc. v. C. & A. Ry. Co.*, 289 Ill. 282, held that it was necessary to itemize the appropriation of the Tuberculosis Sanitarium. While this decision seemed to be contrary to what had been held before by the same tribunal, and while it may have been overruled by the case of *People, etc. v. Hines*, 293 Ill. 419, nevertheless it had to be followed in the case of appropriations for the Tuberculosis Sanitarium. Under the circumstances we deemed it proper to advise the Library Board also to itemize its appropriation in order to avoid the raising of the same question with regard to its taxes.

It is our opinion, in view of what we set forth above, that the treasurer would follow the safer course by keeping account of each separate appropriation made for the Board of Education and for the Board of Directors of the Chicago Public Library.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Letting of Contracts Under Procedure Outlined in General Ordinance.

May 28, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you call attention to Section 3260 of The Chicago Municipal

Code of 1922, and ask for an opinion as to the power of the Commissioner of Public Works to let contracts without being specifically authorized to do so by the City Council.

This is a question that has been raised a number of times in the past, and the Law Department has had occasion to pass on it before. Some of the opinions on this point have been published. (See Opinions from January 1, 1913, to October 5, 1914, p. 741.)

The provisions of the present code with reference to the letting of contracts are the same as have been in force for years. This department in construing them has proceeded on the theory that these provisions recognized the fact that the statutes require authority by ordinance for the letting of a contract, but that it is not necessary to have a separate ordinance for each contract. A general ordinance, coupled with the necessary appropriation, satisfies the requirements of the statutes in most cases, and the code is framed to make possible the expeditious letting of contracts with proper safeguards to protect the municipality.

Section 50 of Article IX of the Cities and Villages Act requires that any work or other public improvements, when the expense thereof exceeds \$500, shall be let to the lowest responsible bidder "in the manner to be prescribed by ordinance." This is the only provision of the statute which need be considered in this opinion, since all other references to contracts in this act inferentially support this as the basis of letting contracts.

There is nothing in the wording of this statute which demands a special ordinance in each instance when a contract is let. It merely provides that the manner of letting contracts shall be prescribed by ordinance. This may be done by general ordinance as well as by special ordinance for the particular work or improvement, although unquestionably in all cases where a special ordinance is passed it supersedes the general provisions for that specific contract.

Acting under authority of the statute, the City Council has prescribed rules for the letting of contracts by the Commissioner of Public Works and the precise manner in which he shall proceed in Article XI of Chapter LXV of the Code. If he advertises, as required by Section 3260, he can proceed without further action on the part of the City Council—always provided that there is an antecedent appropriation for this purpose. If he does not advertise, then there must be express authorization by a two-thirds vote of all the aldermen elected.

Section 3260 merely says, that contracts “shall be let” in the manner provided for therein, but Section 3262 expressly says that all contracts relating to matters under the cognizance of the Department of Public Works “shall be let by the commissioner of public works.”

Hence, the ordinances specifically authorize the commissioner of public works to let contracts relating to the matters in his department. This applies to all contracts for which due appropriation has been made without specification that the appropriation can only be used for the purpose upon further authorization of the City Council. Incidentally, we call attention to the fact that Section 4 of the Appropriation Bill contemplates the procedure which is authorized by general ordinance.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Use of Interest Accruing From Special Assessment Funds.

May 28, 1923.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

In response to your verbal request for an opinion as to whether an annual appropriation is necessary in order to make payments out of the interest accumulated from special assessment funds, we beg to advise you that in our opinion it would be well to appropriate each year the amount to be expended therefrom. In other respects, the matter can be governed by a general ordinance, but the one passed in 1921 does not appear to be intended as a general ordinance.

Section 2 of the act concerning municipal funds (Hurd's Rev. St., Ch. 24, Sec. 758) says that moneys derived from interest on special assessment funds "may by ordinance of the City Council * * * be used in retiring outstanding special assessment vouchers and bonds that may be delinquent," etc.

We do not find anything in the wording of the statute which requires a separate ordinance in each case when money is to be used therefrom. On the other hand, the ordinance which appears in the Council Journal under date of March 11, 1921, at page 1992, seems to have been intended to meet the conditions existing at that time and did not prescribe a permanent rule of conduct to be followed without further action on the part of the City Council. It authorized the Comptroller and Treasurer to retire outstanding bonds and vouchers that were delinquent, and was couched in language that is ordinarily used in directing the doing of some particular thing which when done renders the ordinance or order directing it *functus officio*.

If you are still using this ordinance as your authority for paying such obligations, we recommend a departure from this practice. We believe it would be better to pass an ordinance showing by its language that it is intended as a general ordinance, to remain in force until repealed, and to make provision from year to year, by an appropriation for that purpose, for the payment of money out of the fund in question.

We will forward a copy of this letter to the City Comptroller and will await further word from you or from him, as the case may be.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Council Order Requiring Permission of Alderman of
Ward for Installation of Ferris Wheel—Repeal
or Modification of Ordinance by Order.**

May 29, 1923.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

We have had some correspondence with Attorney August L. Williams concerning an application which has been made for a permit for a 7th class amusement license for an enterprise at 33d street and Wabash avenue, Chicago. We understand that the permit has been withheld because of an order of the City Council on May 3, 1922 (page 136 of the

Journal of the Proceedings of the Council of that date), which requires that the consent of the alderman of the particular ward must be obtained before such a permit is issued.

In line with the policy adopted by this office, we are not furnishing opinions to any but Department, Division or Bureau heads, and for your information beg to advise you as follows:

The order in question above referred to is as follows:

“Ordered, That the Superintendent of Police and the Commissioner of Public Works be, and they hereby are, directed not to issue any permit or permits for the operation of a street carnival or for the operation of a merry-go-round, ferris wheel or like device anywhere within the limits of the City of Chicago without first obtaining the consent to the issuance of any such permit from the aldermen of the respective wards in which it is proposed to conduct any such street carnival or to operate a merry-go-round, ferris wheel or like amusement device.”

In the case of *Hibbard, Spencer, Bartlett & Company v. City of Chicago et al.*, 173 Ill. 91, our Supreme Court said as follows:

“An ordinance of the City can only be repealed or amended by an ordinance of the City. A mere resolution or order by the City Council, not passed and published as an ordinance of the City, would not constitute a repeal of an ordinance duly passed.”

Also in the case of *Chicago and Northern Pacific Railroad Company v. City of Chicago*, 174 Ill. 439, the Supreme Court said:

“But an ordinance cannot be amended, repealed or suspended by a resolution. The act which amends, modifies or repeals a law should be of equal dignity with the act which enacts or establishes the law. A resolution or order is not law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts

of legislation by a municipal corporation, which are to have a continuing force and effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions."

In view of these decisions, we advise you that if applicants have complied with the provisions of the City regulating amusements, they are not bound to comply with the order of the City Council quoted above, *inasmuch as the same is in the form of a resolution and not an ordinance.*

Yours very truly,

LEONARD J. GROSSMAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Distribution of Samples for Advertising Purposes.

May 31, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter of May 26, 1923, asking for an opinion as to what attitude your department should take on the request of the Riggs-O'Dean Company for permission to pass out samples of tooth paste in schools, office buildings, ball parks, etc., has been referred to me for consideration and reply.

The section of the Chicago Municipal Code of 1922 concerning the distribution of advertising matter is as follows:

"366. *Distribution of advertising matter.*) It shall be unlawful for any person, firm or corporation, whether a licensed bill poster or sign painter or not, to distribute, hand out or scatter upon any street, avenue, alley, side-

walk or other public place in the City of Chicago, any circular, dodger, hand-bill, pamphlet, card, picture or any advertising matter of any kind whatsoever, or to distribute hand-bills or other advertising matter at houses, stores or places of business otherwise than by putting the same under doors or in letter boxes connected with the houses, stores or places of business, and when so distributing, no bell connected with the houses, stores or places of business shall be rung."

The samples which the Riggs-O'Dean Company desires to pass out are obviously advertising matter and come within the purview of the section just quoted. We are, therefore, of the opinion that no permission should be granted them to distribute their samples in public.

Very truly yours,

FRANK PADDEN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Power of City to Vacate Streets and Alleys—Vacation
of East and West Alley from North Michigan
Avenue to St. Clair Street Between East Aus-
tin Avenue and East Illinois Street.**

June 4, 1923.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

Referring to the attached concerning vacation of the east and west alley extending from North Michigan avenue to St. Claire street, between East Austin avenue and East Illinois street, submitted to me for approval, I submit the following:

Under Chapter 145, Cahill's Revised Statutes of Illinois for 1921, cities are given the right where public convenience, public interest or public necessity require it, to vacate streets and alleys, and this right has been recognized in a long line of decisions.

The courts will not look behind the vacation ordinance to determine the advisability of the vacation, unless there has been a clear abuse of the right and it appears that it was done purely for a private purpose. *Walbach v. Rubens*, 307 Ill. 186.

It has been customary in the past for the City to demand that private individuals who would be benefited by a vacation ordinance deposit with the City a sum of money to pay any possible claims for damages to adjoining property owners. The money was retained by the City where no claims for damages arose, until the Supreme Court in 1917 in *Lockwood v. Strickland*, 279 Ill. 445, held that a City was required to return any portion of money deposited with it after the Statute of Limitations had run against claims of adjoining property owners, the theory of the court being that there was no right in the City to sell any public right or interest.

Property owners can claim damages only where they suffer a special damage different from that suffered by the general public. *City of Chicago v. Burcky*, 158 Ill. 103.

According to the letter of Joseph F. Peacock, Real Estate Agent, dated March 1, 1923, addressed to the Honorable Ross A. Woodhull, Chairman of Committee on Finance, it appears that the Tribune Building Corporation owns all the property on both sides of the alley in question.

I am of the opinion that if the public interest will be subserved by the vacation of this alley, the City Council has the power by ordinance to vacate the same.

Respectfully submitted,

FRANCIS X. BUSCH,
Corporation Counsel.

Right of City to Acquire Land for Municipal Dump.

June 5, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In reply to your letter of May 16, 1923, asking to be informed as to the status of condemnation proceedings commenced in the County Court for the purpose of acquiring a quarry at Rockwell street and Grand avenue for a dump, I wish to advise you as follows:

The owners of the property have filed legal objections to the petition on the ground that the City has no power to condemn property for that purpose. The matter has been set for hearing at an early date. The proceeding presents a case where the rights of the City in the premises are not at all certain, but we hope to be able to maintain our position.

The question of whether the City has the right to acquire a dump must be determined from the grant of powers by the legislature. These powers are of three kinds:

Those specifically granted,

Those implied as necessary to carry out specific powers,

Those essential to the declared objects of the corporation. There is no specific grant of power to the City to acquire a dump and if the City has that power, it is because it is necessary for corporate purposes or because it is fairly implied from powers expressly granted. Sections 12 and 78 of Chapter 24 of Cahill's Revised Statutes of 1921 are as follows:

“Section 12. To provide for the cleansing of the same.” (Streets and alleys.)

“Section 78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”

Section 78, as will be noted, gives the City power to promote health and suppress disease; to do all acts necessary or expedient for the promotion of health or the suppression of disease. The disposition of garbage and like things is not only expedient, but absolutely necessary. How it shall be done is a matter for the City to determine, for the courts have uniformly held that if a power can be exercised at all, it can be exercised in the manner the City chooses, unless there is some law to the contrary.

County of Mercer v. Wolff, 237 Ill. 74 (77).

In *Spiegler v. City of Chicago*, 216 Ill. 114, the court went so far as to uphold an ordinance regulating the handling of oils in tank wagons or other wagons or vehicles as a health measure under said Section 78.

In *Gundling v. City of Chicago*, 176 Ill. 340, the court sustained an ordinance regulating the sale of cigarettes as a measure tending to the promotion of health of the community. Speaking on this point, the court on page 348 say:

“The most important of police powers is that of caring for the health of the community and that is inherent in a municipality and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation.

Ferguson v. City of Selma, 43 Ala. 400.”

This language seems to be strong enough to cover any case where the public health is involved and to give to the City power to do whatever may be necessary to preserve it.

In *City of Chicago v. Peck*, 98 Ill. App. 434, the power of the City to lease ground to build a smallpox hospital was upheld as a necessary health measure; and in *City of Chicago v. Gunning System*, 214 Ill. 616, an ordinance regulating the construction of billboards was sustained under several sec-

tions of the statute conferring powers on the City, including Section 78.

Section 12 above referred to gives the City the right to provide for the cleansing of streets and alleys. It will be noted that this section is not a regulatory one, but gives to the City the right to provide means for keeping the streets clean. It seems to follow logically that any method might be adopted by the City for carrying out the provisions of this section. Finding a place to dump dirt or offal is as necessary as hiring wagons to carry it away.

Conceding that the City has the right to adopt any method of exercising a power which it possesses, the City of Chicago can dispose of its garbage, ashes or other similar things by the purchase of a dump or in the event of its inability to purchase, by condemning property therefor.

There are a number of statutes relating to the power of eminent domain, most of which are general laws and cover all incorporated towns. The City of Chicago has, however, a broader right than any of them under a special statute passed in 1905, which will be found as Section 297 of Chapter 24, Cahill's Revised Statutes of 1921, page 515, and which reads in part as follows:

"The City may exercise the right of eminent domain by condemnation proceedings in conformity with the provisions of the constitution and statutes of the State of Illinois for the acquirement of property, *useful, advantageous or desirable* for municipal purposes. * * *"

It is my opinion that the City of Chicago is within its rights in seeking to condemn the property in question for a municipal dump.

Very truly yours,

FRANK M. PADDEN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Appointment of Otto Cederwall as Third Assistant
Superintendent of Streets.**

June 5, 1923.

COL. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have asked me to look up the status of certain legal proceedings affecting one Otto Cederwall, Third Assistant Superintendent of Streets.

In reply I beg to say that an examination of the records of the Civil Service Commission shows that the position of Third Assistant Superintendent of Streets in charge of street repairs was, on July 2, 1918, classified as Class 1, Supervising Service, Grade 4. An *original entrance* examination was held for this position July 2, 1918, and an eligible list was posted August 1, 1918. Thirteen candidates took this examination, of whom two passed: Otto Cederwall, with a grade of 72.70, and Thomas F. McGrath with a grade of 70.70. Otto Cederwall was certified to this position August 16, 1918.

At the time this examination was taken, Ward Superintendents were classified in Class 1, Supervising Service, Grade 3, being in the same grade and character of work, and in the next lower rank or grade to Third Assistant Superintendent of Streets. Under the *Errant* case, reported in the 229 Illinois Supreme Court Reports, at page 56, there is no question but that the examination should have been a promotional examination. Evidently proceeding upon this theory, on August 17, 1918, an information in the nature of *quo warranto* was filed in the Circuit Court of Cook County by Maclay Hoyne, State's Attorney, said case bearing number B-45499. The former Corporation Counsel appeared and filed an answer in behalf of the defendant, to which answer the petitioner demurred.

On December 6, 1921, the suit was dismissed by stipulation entered into between the attorneys for the petitioner and the then Corporation Counsel representing the defendant.

In my opinion the appointment of Cederwall to this position was illegal and contrary to law, and an order should be entered by the Civil Service Commission setting forth that the Commission is advised by the Corporation Counsel that said examination was illegal and contrary to law, and for that reason the certification of said Cederwall to the position of Third Assistant Superintendent of Streets in charge of street repairs is withdrawn, and the records of the Commission concerning the certification and appointment of said Cederwall are cancelled and expunged.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Power and Authority of the City to Require Elevated Trains to Keep Their Doors Unlocked.

June 6, 1923.

TO THE HONORABLE, THE CITY COUNCIL
OF THE CITY OF CHICAGO:

Dear Sirs:

The Law Department is in receipt of a communication from the City Council asking for its opinion as to whether the City of Chicago, under its general police power to protect the public health and provide for the safety of the public, could compel the elevated roads to keep their doors unlocked so that an exit could be provided in case of a fire being started inside of one of the cars.

The consideration of the specific question upon which this department has been asked to give an opinion is broad enough

to include the entire subject as to whether the City Council has the right to make and enforce such regulations concerning the operation of elevated trains, as in the opinion of the legislative body are necessary to protect the public health or safety, or provide for the comfort and convenience of citizens who are passengers on the elevated roads, and of the public generally.

The question presented may be divided into three parts which will be considered separately.

First.—What rights, if any, were reserved by the City in making the original grants to the elevated railroads to build and operate that system of transportation in the City of Chicago?

Second.—What jurisdiction has the City of Chicago, acting through the City Council and under its general police power, to make such regulations as to it seems necessary to provide for the health, safety, comfort and convenience of the traveling public on the elevated roads and of the public generally?

Third.—To what extent, if any, have the powers of the City been superseded, modified, abridged or abrogated by the Act of June 29, 1921, known as the Public Utilities Act, which has created the Illinois Commerce Commission and given to it certain powers over the public utilities of the State?"

Addressing ourselves to the first proposition above stated, we would call your attention to the fact that on March 26, 1888, the City Council passed an ordinance granting permission and authority to the *Chicago and South Side Rapid Transit Railroad Company* to construct, maintain and operate an elevated railroad in the City of Chicago. The rights under this ordinance were subsequently assigned to the *South Side Elevated Railroad Company*, which corporation acting under these rights and others subsequently passed, is now operating.

Section 8 of said ordinance provides as follows:

"The City of Chicago reserves to itself the right of regulating by ordinance the rate of speed at which the said trains shall run and also the right to regulate the heating of cars and depots, and also *the right to impose*

such regulations as the council may deem necessary for the protection and safety of the public."

This ordinance was accepted May 24, 1888, and is binding upon the successor of the grantee.

On December 28, 1888, the City Council passed an ordinance authorizing the *Lake Street Railway Company* to construct, maintain and operate an elevated railroad on Lake street from Canal street to the city limits. This ordinance was formally accepted by the company, February 25, 1889. The present *Chicago and Oak Park Railway Company* subsequently became the assignee of the rights of the *Lake Street Railway Company* and is now operating by virtue of the rights therein granted in connection with other ordinances subsequently passed.

Section 3 of this ordinance provides as follows:

"Said Company shall, and it is hereby authorized to construct, maintain, and operate two elevated railroad tracks with such curves, supports, columns, girders, telegraph, telephone and such signal devices as are above specified in above sections as may be necessary and proper upon Lake Street and across the streets and avenues and alleys intercepting such streets and the said railroad company shall use and operate the railroad tracks hereby authorized to be constructed, with locomotives or other engines or motors and cars, *subject to all ordinances of the City of Chicago applicable thereto.*"

Section 13 of the same ordinance provides as follows:

"The privileges hereby granted are subject to all general ordinances of the City of Chicago now in force or hereafter to be passed in reference to elevated railways. And the City of Chicago reserves to itself the right of regulation, by ordinance the rate of speed at which the said trains shall run and also the right to regulate the heating of cars and stations and also the right to impose such regulations as the council may deem necessary for the protection, convenience and safety of the public, and public and private property."

On January 8, 1894, the City Council passed an ordinance granting permission to the *Northwestern Elevated Railroad Company* to construct, maintain and operate an ele-

vated railroad and branches in the City of Chicago. This was formally accepted by the company January 15, 1894.

Section 4 of this ordinance which is the section directly authorizing construction, maintenance, and operation of said elevated railroad and its branches, is as follows:

“The said Company may, and is hereby authorized to construct, maintain and operate the said elevated railroad and branches with one or more tracks, as aforesaid, and with such switches, curves, sidings, turnouts, connections, supports, columns, girders, telegraph, telephone and signal and other devices, as above specified in the first section hereof, across the streets, avenues, alleys, public places, railroad tracks and branches aforesaid and over and across any alleys in the district, in which the route herein specified is located, and also over, upon, along and on the said route by lease, purchase, condemnation or otherwise, and the said railroad company may use and operate the railroad tracks, hereby authorized to be constructed, with locomotive or other engines or motor, and railway cars, *subject to all ordinances of said City of Chicago now in force, or, that may hereafter be passed and be in operation.*”

On April 7, 1892, the City Council passed an ordinance granting to the *Metropolitan West Side Elevated Railroad Company* the right to construct, operate and maintain for a period of fifty years from and after the passage of the ordinance an elevated railroad and branches in the City of Chicago. Together with other ordinances subsequently passed, this ordinance is the basis of the rights under which the elevated railroads on the West Side are now operated.

Section 4 of said ordinance provides as follows:

“The said company may, and it is hereby authorized to construct, maintain and operate the said elevated railroad and branches, with one or more tracks as aforesaid, and with such switches, curves, sidings, turnouts, connections, supports, columns, girders, telegraphs, telephones and signal and other devices as above specified in the first section hereof, across the streets, avenues, alleys, public places, railroad tracks and bridges aforesaid, and over, along, and upon and across any lands which it may acquire on the said route by lease, purchase, condemna-

tion or otherwise; and the said railroad company may use and operate the railroad track or tracks hereby authorized to be constructed, with locomotives or other engines or motors, and cars; *subject to all ordinances of said City of Chicago now in force or that may hereafter be passed applicable thereto.*"

From the foregoing provisions in the grants to the *Northwestern Elevated Railway Company*, the *South Side Elevated Railroad Company*, *Chicago and Oak Park Elevated Railway Company* and the *Metropolitan West Side Elevated Railroad Company*, we are of the opinion that the City Council has ample power to pass any ordinance making reasonable regulations for the protection of the public health or to provide for the safety and convenience and comfort of the traveling public on those roads. And in so far as any of the elevated trains are now operated under the grants referred to in this opinion to the four corporations above mentioned, the council, by reason of these provisions has the right to make the regulations herein defined. It would, therefore, follow that the City Council has power to pass an ordinance compelling the roads above mentioned to keep their doors unlocked so that an exit could be provided in case of fire. This opinion, however, is subject to such observations as we will hereafter make in connection with the Public Utilities Act and the powers of the Illinois Commerce Commission.

There are numerous other ordinances covering hundreds of pages which specifically detail many matters in the construction and operation of the various elevated roads, many of which provide for plans and specifications to be approved by the Commissioner of Public Works, but none of which bears directly upon the subject-matter in question.

Coming to the discussion of the question before us under the second heading above mentioned.

Second.—What jurisdiction has the City of Chicago, acting through the City Council and under its general police power, to make such regulations as to it seems necessary to provide for the health, safety, comfort and convenience of the traveling public on the elevated roads and of the public generally?

We respectfully call your attention to Article 5 of the Cities and Villages Act as finally amended and passed, June 30, 1921. This article specifically enumerates the powers of the City Council. The three provisions in this enumeration of powers which the Supreme Court of this state has construed to give the City its *general police power to protect the public health and provide for the safety, comfort and convenience of the public, are as follows:*

“66—To regulate the police of the City or Village and pass and enforce all necessary police ordinances.

78—Make all regulations which may be necessary or expedient for the promotion of health or the suppression of a disease.

100—To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to Cities or Villages with such fines or penalties as the City Council or Board of Trustees shall deem proper.”

These general police powers of the City have been quite fully defined by the *Supreme Court* and are *well settled*.

In the case of *Chicago v. Union Traction Company*, 199 Ill., page 270, the case in which the Supreme Court sustained an ordinance passed by the City Council requiring the street railway company to remove all dirt, snow, and other accumulations from the surface of the street between the tracks, the court said in its opinion:

“The City as the representative of the State is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety and comfort of the people, the exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the City.”

The court further says:

“No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power for it is incapable of alienation. It cannot be doubted that a company which secures the right to use the streets of a

municipal corporation takes it subject to the police power, resident in the state as an inalienable attribute of sovereignty."

In the case of *City of Chicago v. Chicago City Railway Company*, 222 Ill., page 573. The Supreme Court in affirming the validity of an ordinance designed to promote the public comfort, safety and health by preventing the overcrowding of cars, says:

"The ordinance in this case is within the powers conferred upon the defendant and it has for its object the laudable purpose of protecting the traveling public against discomfort, annoyance and danger. It is designed to promote the public comfort, safety and health."

In the case of the *City of Chicago v. Chicago City Railway*, 227 Ill., page 239, the Supreme Court in its opinion says:

"The police power of a city may be exercised in a variety of ways in the regulation of street car traffic for the public safety or convenience, such as providing against the overcrowding of cars, compelling proper sitting facilities, specifying the side of the street at which stops shall be made and any other matters which shall promote the public safety, comfort or convenience."

The Supreme Court in the case of the *Public Utilities Commission v. City of Quincy*, 290 Ill., page 364, in discussing the police power, says:

"The police power of the state has never been exactly defined or circumscribed by fixed limits. It is considered as being capable of development and modification within certain limits, so that the powers of governmental control may be adequate to meet changing social, economic and political conditions in a general way. It may be defined as 'comprehending the making and enforcement of all such laws, ordinances and regulations as pertained to the comfort, safety, health, convenience, good order, and welfare of the public.'"

And again on page 365, the court says:

"It has long been a principle of constitutional law that in these matters relating to the police power, each

successive legislature is of equal authority and that a legislative body can not part with its right to exercise such police powers, but has authority to use it again and again as often as the public interest require. It has been said that the governmental power of self-protection can not be contracted away nor can the exercise of rights granted nor the use of property be withdrawn from the implied liability to governmental regulation in parts essential to the preservation of the community from injury. These principles are embodied in the familiar rule that the State can not barter away the right to use the police power, and can not by any contract divest itself of the power to provide for acknowledged objects of legislation falling within the domain of the police power. Accordingly the legislature can not surrender or limit such powers, either by affirmative action or by inaction, or abridge them by any grant, contract or delegation whatsoever. The discretion of the legislature cannot be parted with, any more than the power itself. These principles apply to the police power delegated to municipal corporations, thus the general police power possessed by a city is a continuing power and is one of which a city can not divest itself, by contract or otherwise."

From the foregoing expressly delegated police powers as quoted from the Statutes of Illinois, together with the interpretation placed upon such police powers by the Supreme Court of Illinois, we are clearly of the opinion that the City Council has full power to pass any ordinance which in its judgment is necessary or advisable to protect the public health or provide for the safety, convenience and comfort of the traveling public.

This would include, of course, the right to pass an ordinance compelling the elevated railroads to keep their doors unlocked so that an exit could be provided in case of fire. This opinion is subject to such observation as may be hereafter made in connection with the Public Utilities Act.

We come now to the consideration of the third proposition as outlined at the beginning of this opinion:

"To what extent, if any, have the powers of the City been superseded, modified, abridged or abrogated by the Act of June 29, 1921, known as the Public Utili-

ties Act, which has created the Illinois Commerce Commission and given to it certain powers over the public utilities of the State."

In examining this question, we will consider this act in the light of the opinion heretofore expressed, *that at the time of the passage of this act, or at the time of the passage of the Act of June 26, 1913, which was the first Public Utilities Act passed by the Legislature of Illinois, the right of the City under its general police power and under the franchise restrictions to make such regulations as to it seem necessary, to provide for the health, safety, comfort and convenience of the public was unquestioned and unqualified except as to such modifications or restrictions as might later be made by the Illinois Legislature.* We will, therefore, examine the Act of June 29, 1921, for the purpose of determining, if possible, to what extent it affected the powers of the City as heretofore defined in this opinion.

The title to the act gives us no particular light on the subject, as it is "*an act concerning public utilities.*"

Two sections particularly define the duties and grant the powers of the Illinois Commerce Commission so far as they are material to the question before us.

Paragraph 23, Section 8 of Article I, defines the duty of the commission and directs the performance of certain acts. It is as follows:

"The commission shall have general supervision of all public utilities except as otherwise provided in this act, shall inquire into the management of the business thereof, and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utility, and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated not only with respect to the adequacy, security and accommodation afforded by their service *but also with respect to their compliance* with the provisions of this act *and any other law*, with the orders of the commission and with the *charter and franchise requirements.*"

Addressing ourselves at the outset, to the question as to whether or not the powers of the City, in respect to the question before us, have been abrogated or suspended, it appears that the particular section defining the duties of the Illinois Commerce Commission recognize that there were *other laws* and that there were charter and *franchise requirements* to which it was the duty of the public utility over which the commission exercised jurisdiction *to obey and comply with*, and that instead of abrogating or superseding the powers of the City, it was definitely made a part of the duty of the commission to examine such public utility and keep informed as to whether or not they were complying with *other laws than the orders of the commission* which affected them, and whether they were *complying with the charter and franchise requirements of said public utilities*.

Considering either phase of the language above defined, we must come to the conclusion that the Legislature had two things in mind with respect to which it made it part of the duty of the commission to compel compliance with it, first "any other law," this language must mean either any law then existing, which was valid, and which affected the "adequacy, security and accommodation offered by their service" (of said public utilities) or any law which might hereafter be passed which was valid, which would so affect the said service. The City of Chicago acting by ordinance of the City Council, had, as we have seen, before the passage of this act, clearly the right to pass a law with respect to the adequacy, security and accommodation offered by their service (of said public utilities). It would seem that so far from it being the intention of the Legislature to abrogate or supersede any such other laws, it clearly had them in mind in using the language above referred to. We find nothing in the act which either directly or indirectly indicates any intention of the Legislature to take away any such powers.

From the reference to the charter and franchise requirements, it would appear that the Legislature might well have had in mind the situation in Chicago as it actually exists with respect to the elevated roads. These roads are operated by

virtue of the rights and grants quoted in the first section of this opinion which may properly be termed "Their franchises." In the *Northwestern Elevated Railroad Company's* franchise, which is the least comprehensive of the four, the right to "construct, maintain and operate elevated roads" in the City of Chicago, is *subjected to all ordinances of said City of Chicago now in force or that may hereafter be passed and put in operation*. It must appear conclusively therefore that in originally defining the duties of the Illinois Commerce Commission, the Legislature intended to make it the duty of the Illinois Commerce Commission *to compel compliance with all valid laws passed by cities acting under their general police power which pertained to "the adequacy, security and accommodation offered by their service" and also with the franchise requirements of said public utilities*.

We shall presently show that the Supreme Court of Illinois has taken exactly this view of this act, but before doing so, we wish to call your attention to that section of the Public Utilities Act, which directly gives the commission its authority to act in matters now under discussion. Paragraph 64, Section 49 of Article 4 of said provision,

"Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, equipment, appliances, facilities or service of any public utility or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate or sufficient rules, regulations, practices, equipment, appliances, facilities, service or methods to be observed, furnished, constructed, enforced, or employed, and it shall fix the same by its order, decision, rule or regulation. The commission shall prescribe rules, and regulations for the performance of any service, or the furnishing of any commodity of the character furnished or supplied by any public utility."

We can see nothing in the language above quoted which in any way affects, or would cause us to modify the conclusion reached as to the right of the City to exercise its police pow-

ers concerning the subject in question. Nothing in the language indicates that any of the City's police powers are intended to be withdrawn nor is any original exclusive jurisdiction of the subject-matter indicated. We will later quote some decisions which discuss this phase of the question.

We believe the question is now not before us as to what extent the Illinois Commerce Commission may have the power to modify or set aside an ordinance of the City of Chicago passed for the purpose of protecting the public health, safety, convenience and comfort. That question would arise only when the commission undertook *to take such action*.

The present question concerns the power and duty of your Honorable Body to make such regulations as to it seem requisite and proper within the limits defined. Any contention that the Commerce Commission has exclusive jurisdiction over the utilities in question must be based upon the decision of the Supreme Court in the *City of Chicago et al. v. Wm. L. O'Connell*, 298 Ill., page 605, where the question arose concerning the jurisdiction of the Public Utilities Commission created by the Act of 1913 to change certain regulations made by the City of Chicago in respect to the operation of street cars under the so-called Settlement Ordinances of 1907. We do not concede that the opinion of the court in that case applies to the present act or to different circumstances. The facts in that case are not entirely similar to the present situation.

But on the question now before us, we think that the court in that case has clearly confirmed the opinion of this department.

Quoting from the opinion of Mr. Justice Cooke in that case on page 605, the court says:

"Appellees contend, however, that the settlement ordinances and the unification ordinance, having been accepted and acted upon by the railway companies, constitute binding contracts between the City and the railway companies, and that their obligation cannot be impaired by any act of the legislature or by any order of the State Public Utilities Commission. Appellees' con-

tention is undoubtedly sound so far as the contracts relate to matters which do not affect the public safety, welfare, comfort or convenience. Thus, the grant of the right to the railway companies to construct and operate street railways in the city, the agreement to divide the net receipts between the railway companies and the City and the option given to the City to purchase the railway properties at a certain price are all matters which do not affect the public safety, welfare, comfort or convenience, because it is immaterial to the public what person or corporation operates the street railways or what disposition is made of the profits, and over those matters neither the State nor the State Public Utilities Commission has any control by virtue of the police power. Nor has the commission by the order here complained of assumed to exercise control over any such matters. The order requires only such things to be done by the railway companies as will, in the judgment of the commission, improve the service furnished the public and *in so far as the order conflicts with the ordinances concerning such matters the order of the commission supersedes and sets aside the provisions of the ordinances*, but does not, within the meaning of the constitutional prohibition, impair the obligation of any contract, because the City had no power to contract away any of the police power delegated to it by the legislature."

It is clear that the Supreme Court in this, the leading case, which sustains the jurisdiction of the commission, and must be relied on by those who dispute the powers of the City in these premises, entirely upholds our view here expressed when they say that the order of the commission supersedes and sets aside the provisions of the ordinance only in so far as they conflict with a valid order of the commission. Later in the same opinion the court reaffirms the case of *City of Chicago v. Chicago Union Traction Company*, 199 Ill. 259, and quotes from the words of the opinion wherein it is said:

"The City, as the representative of the State, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety and comfort of the people. *The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the City.*"

The power of the City to legislate originally on the subject-matter is again recognized in the case of the *Central Illinois Public Service Company v. City of Sullivan*, 215 Ill. App. 495, where the court says:

“In so far as an order of the Public Utilities Commission *conflicts with City ordinances* concerning matters over which the Commission has jurisdiction, the order of the Commission supersedes and sets aside the provisions of the ordinances.”

The Court of Appeals of the State of New York where the Public Service Commission is acting under a law very similar to the one in Illinois, has taken the same view of the jurisdiction of the City in regard to matters wherein it had powers apparently concurrent with those of the Public Service Commission.

In the case of the *People ex rel. City of New York v. Belt Line Railway Corporation*, 230 N. Y., page 86, the Court of Appeals says that the jurisdiction of the Public Service Commission is not exclusive in such a case. Judge Crane, stating its opinion, says:

“The railway corporation’s claim is that it cannot be compelled to raise one of its tracks to meet the changes caused by repaving unless so ordered by the Public Service Commission acting under the powers delegated to it by Section 50 of the Public Service Commissions Law. Both the Greater New York charter and the Public Service Commissions Law emanate from the same source, the legislature of the state, *and so far as possible are to be harmonized.* * * * That the City has proceeded in the utmost good faith to repair 59th street and to improve it by a reasonable change in the crown or surface of the highway is not challenged in this application. The respondent, as stated in the letter of its president, relies upon its rights and insists that *it can only be compelled to do this work by order of the Public Service Commission.* With this contention we disagree and think that the order made by the special term was quite proper.”

Again in the case of *City of Syracuse v. New York State Rys.*, 198 New York Supplement page 763, the Special Term of the Supreme Court said:

“Assuming that the Public Service Commission has jurisdiction in a controversy between a street railway and the City, wherein the City is seeking to make the street railway conform its tracks to a changed grade of the street in compliance with the contract between them, *it has not exclusive jurisdiction, and the City may properly resort to mandamus in the court.*”

In the case of *Town of Victoria v. Victoria Ice L. & P. Co.*, decided September 21, 1922, appearing Vol. 1923A of the Public Utilities Reports, page 495, where the situation so far as the relations of the municipality and the State Corporation Commission are not dissimilar to our own, the Virginia Supreme Court has put the same construction upon the matter. The court says, on page 475:

“We find the cities authorized to grant franchises which under certain conditions shall make adequate provision to secure efficiency of public service at reasonable rates, the Constitution authorizing the General Assembly to vest the Commission with plenary power to regulate the rates of all public service corporations, and this followed by the statute expressly subjecting all public utilities to the control of the State Corporation Commission, providing for investigations by the Commission, with power to prescribe just and reasonable rates in lieu of any found upon such investigation to be unjust and unreasonable.

“If upon such investigation and hearing it appears that the *franchise ordinance involved does make adequate provision by way of forfeiture or otherwise for reasonable rates, it satisfied the public right so clearly reserved in the constitution*; but in order to ascertain whether or not it does so, and that there may be no doubt about it, the State has exercised its theretofore dormant power and *provided the tribunal for testing the adequacy of the provision and the reasonableness of such rates.*”

It will be observed in the above quoted case, cities in Virginia are exercising their ordinary powers with regard to fixing rates, but that the State as in the State of Illinois had provided a State Corporation Commission, which had the right to determine and pass on the adequacy of the provi-

sions made by the municipal governments. In the State of Virginia, the original jurisdiction of the municipality to legislate is recognized by the courts. The mere fact that the State Corporation Commission may upon hearing, under certain circumstances reverse or modify the legislative acts of the municipality, in no way impairs their primary validity or takes anything from their original powers.

In the case of the *State v. City of New Orleans*, decided on March 20, 1922, as appearing in Vol. 1922E of the Public Utilities Reports, the Supreme Court of Louisiana has held on page 183:

“The authority to fix the rate of carfare on street railways in the City of New Orleans remains vested in the municipal council under the terms of the amendment to the Constitution of 1921 giving the Public Service Commission authority to fix rates, fares, tolls, and charges of public utilities, local as well as state-wide, but reserving existing powers of local government.”

In Vol. 6 of Ruling Case Law, 1915 Edition, the following doctrine is laid down as the weight of authority. the rule having been taken from the case of *Malone v. Williams*, 108 Tenn 7390 S. W., page 798:

“The police power may also be delegated by the legislature to municipal corporations, and when so delegated by the legislature the agency employed is clothed with a power to act as efficient as that possessed by the legislature itself. Notwithstanding the broad application of the principle that the legislative power may be delegated, it has its limitations, and hence it is held that the delegation of an exclusive power can not be made over the matter whose control has been lawfully vested in and not withdrawn from other branches of the government.”

The power to legislate on the subject-matter having been clearly delegated to the City and, as we observed in quoting from the Utilities Act, never having been definitely withdrawn, it seems that this doctrine of law is exactly applicable to the present situation.

The foregoing citation of authorities outside of the State of Illinois confirm us in the opinion already expressed that the City Council has a right to make and enforce such regulations, concerning operation of elevated trains as in its opinion are necessary to protect the public health or safety or provide for its comfort and convenience.

In reaching this conclusion, we do not express an opinion or attempt to construe the provisions of the Act of June 29, 1921, so far as it bears on the power or right of the Illinois Commerce Commission to revise or overrule or supersede a valid ordinance of the City of Chicago. That question is not before us, and could not arise until such action had been attempted by the Illinois Commerce Commission. This can only be done, in any event, after a hearing before that body.

We think it is proper at this time to call the attention of your Honorable Body to Chapter 6 of the Public Utilities Act. This chapter provides that the exclusive jurisdiction of the regulation of public utilities operating in the city, shall be vested in the said City and such regulation made by ordinance of the City Council. We have caused a copy of this section to be made and attached to this opinion for your information as to its exact provision.

You will observe from this article that under Paragraph 104 of this article being Section 85 of Cahill's Statutes that the chapter shall not be in force or operation until the question of its adoption shall first have been submitted to the legal voters of the City at the time and in the manner specified and shall have been approved by a majority of those voting at such election. This section if made effective by referendum directly takes away from the Illinois Commerce Commission all original jurisdiction to regulate public utilities within the city, and vests the same exclusively in the City itself.

It may well be worth the consideration of your Honorable Body to determine whether steps should not be taken to submit this question to the voters of Chicago for their decision.

On January 27, 1922, the Law Department rendered a written opinion to the Superintendent of Police that the matter of compelling the Northwestern Elevated Railroad Company to operate its cars with all the doors and gates unlocked was entirely within the jurisdiction of the Illinois Commerce Commission and that the City had no power in the matter. This opinion was signed by Carl J. Appell, Assistant Corporation Counsel, and approved by Samuel A. Ettelson, Corporation Counsel. In view of the conclusions of law which we have reached on this subject, we cannot concur in this opinion of January 27, 1922, and the same is for that reason withdrawn.

Respectfully submitted,

JOSEPH R. W. COOPER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Construction of Ordinance Allowing Garage to Operate Filling Station as Incidental to the Business.

June 7, 1923.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

This matter comes before the Board of Hearing as a protest against the operation of a filling station by Messrs. Weber and Dunne, on premises located on the southeast corner of Garfield boulevard and Oakley avenue, Chicago, Ill.

It develops from the evidence produced at the hearing that the filling station complained of comes within the province of Section 249 of Article 2, Chapter 11, page 65, Chicago Municipal Code of 1922, covering public garages, reading as follows:

“(Additional Privileges.) Every person, firm or corporation licensed to conduct a public garage shall have the privilege of managing, conducting, operating or carrying on a private garage within the same building, structure, premises or enclosure; and shall also have the privilege of conducting therein the business of an automobile repair shop, the business of an automobile salesroom for automobiles and automobile accessories, and the business of a filling station (provided, that the combined capacity of all containers or tanks, either portable or stationary, for the storage of ether, carbon bisulphite, gasoline, naphtha, benzole, hydrocarbon, liquefied petroleum gas, acetone, kerosene, turpentine, or other inflammable liquids, having a flash point below 165 degrees fahrenheit, do not exceed 550 gallons) without the necessity of obtaining additional licenses.”

By said ordinance it is permitted to maintain a filling station in connection with the garage.

It is further shown that the above mentioned parties have maintained at this location, an automobile repair shop since 1921, proper frontage consents for such automobile repair shop having first been obtained; that on February 6, 1923, application was made for a garage license for the operation of a garage at this address, and under date of February 3, 1923, Edward P. Doyle, police officer, reported an investigation made by him of these premises, in which, among other statements, is included the following:

“This place of business is in a block where two-thirds of the buildings on both sides of the street are used for residence purposes. Verified frontage consents are on file with application under date of December 5, 1921.”

On March 8, 1923, said application for licensed garage was endorsed as follows by the Department of Buildings:

“O. K. for license in so far as this department is concerned. Dept. of Buildings, Peter C. Hoey, Secretary.”

And on March 16, 1923, said application was endorsed as follows by the Fire Prevention Bureau:

“Approved 1250 square feet, no gasoline. John Plant, Acting Chief of Bureau, by E. O. P.”

On March 20, 1923, license for garage was issued, and on April 2, 1923, permit for gasoline tank of the capacity of 550 gallons was issued.

The aforesaid protest directed to the Commissioner of Buildings and the Chief of the Fire Prevention Bureau refers to a permit for the erection and maintenance of a gasoline filling station, and was received at the office of the City Collector, May 21, 1923, approximately two months after the issuance of the garage license and the permit for the erection of the aforesaid gasoline tank.

In view of the fact that the operation of a filling station with a tank capacity as above set out is permitted under the ordinance above quoted covering public garages, and further that the license for garage and permit for gasoline tank at the aforesaid location had already been issued, there is no matter properly before your board for hearing and the existing situation in so far as your board is concerned should be left as it is.

Respectfully submitted,

FRED V. MAGUIRE,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payments of Employees by Check Instead of Cash.

June 7, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We beg leave to acknowledge the receipt from you of a communication addressed to you by the Automatic Electric

Company under date of June, 1923, in which they state that previous to March, 1921, the Automatic Electric Company had the cash for its weekly payrolls brought from the bank every Wednesday, and, as their payrolls averaged around \$50,000 each week, it necessitated the handling of large sums of money.

They also state in their communication to you that while these payrolls were insured, and guards were provided, there was always great danger of a holdup which would not only involve the loss of the money but—what was far more important—endanger human lives. Owing to this situation they state that they took the matter up with the Unions to which their employees belonged, and in March, 1921, an agreement was made whereby the Unions agreed that their members might be paid by check.

The International Brotherhood of Electrical Workers, Union No. 713, has now requested the Automatic Electric Company to resume cash payments. They also state in their communication to you that, in case they return to the cash-payment system, they will have to call on you to furnish police protection, but as they prefer to continue the system of paying their employees by check, they are asking that a communication be sent by the Superintendent of Police stating your view as to the advisability of their abandoning the system of paying by check.

In reply to your oral request that we advise you what, if any, law is now in force in this State regulating the payment of wages to employees by employers, we desire to advise you that Sections 19a and 19b of Chapter 48, Hurd's Revised Statutes 1921, page 1532, provide as follows:

"19a. PAYMENT OF WAGES OTHERWISE THAN IN LAWFUL MONEY—MUST BE REDEEMABLE UPON DEMAND, WITHOUT DISCOUNT AND FOR FACE VALUE IN LAWFUL MONEY OF U. S.) Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That no person, firm or corporation engaged in any business or enterprise within this State shall issue, in payment of or as evidence of indebtedness, for wages due an employe for labor, any time check, store order,

script, or other acknowledgment of indebtedness, unless the same is payable or redeemable upon demand, without discount and for face value, in lawful money of the United States at the office or place of business of such person, firm or corporation.

"19b. PENALTY. Section 2. Any person, firm or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not to exceed one hundred (\$100) dollars, or confined in the county jail for a period not to exceed thirty (30) days, or both, in the discretion of the court."

The above statute is the only one in Illinois regulating the payment of wages to employees by employers, and, in our opinion, this statute cannot be construed as prohibiting the payment of wages by checks or other negotiable instruments payable or redeemable upon demand without discount and for face value in lawful money of the United States.

We, therefore, beg leave to advise you that there is no law in Illinois making it compulsory upon employers to pay wages to employees in cash, and that the payment of wages to employees by employers by check is not contrary to law.

As to whether or not you should address to them a communication such as they suggest, is a matter of policy for you to determine; and the advisability of your doing so, is for you to decide.

Yours very truly,

JAMES W. BREEN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Necessity of Acquiring Permit to Erect Automobile Greasing Rack.

June 9, 1923.

HON. SAMUEL E. PINCUS, Prosecuting Attorney.

Dear Sir:

In reply to your request of June 6, 1923, for an opinion as to whether or not a permit is necessary for the erection of a greasing rack for automobiles under Section 430 of the Chicago Municipal Code of 1922, we advise you as follows:

Section 430 reads as follows:

"430. PERMITS—WHEN REQUIRED—LIMITATIONS OF TIME FOR.) Before proceeding with the erection, enlargement, alteration, repair or removal of any building or structure in the city, a permit for such erection, enlargement, alteration, repair or removal shall first be obtained by the owner or his agent from the commissioner of buildings, and it shall be unlawful to proceed with the erection, enlargement, alteration, repair, or removal of any building, or of any structural part thereof, within the city, unless such permit shall have first been obtained from the commissioner of buildings. And, if after such permit shall have been granted, the operations called for by the said permits shall not be begun within six months after the date thereof, or if such operations are not completed within a reasonable time, then such permit shall be void, and no operations thereunder shall be begun or completed until an extended permit shall be taken out by the owner or his agent, and a fee of twenty-five per cent of the original cost of permit shall be charged for such extended permit; provided, however, that in no case shall a permit be issued or renewed for a less fee than two dollars."

Under the terms of this section, permits must be obtained for the erection, enlargement, alteration, repair or

removal of any structure included in the class termed buildings, in the class known as structures, and an automobile greasing rack not being a building, it must necessarily fall within that class known as structures in order to be included in those constructions, for which a permit is necessary under the terms of Section 430.

In the case of *Farro v. State*, 46 S. W. 932, 39 Tex. Cr. R. 452, 73 Am. St. Rep. 950, quoted in Words and Phrases, Judicially Defined, the following is set out:

“ ‘Structures’ is defined to be that which is built or constructed; an edifice or a building of any kind; in the widest sense, any production or piece of work, artificially built up or composed of parts and joined together in some definite manner; any construction.”

In the case of *Karasek v. Peier*, 61 Pac. 33, 35, 22 Wash. 419, 50 L. R. A. 345, also quoted in Words and Phrases, Judicially Defined, the following is set out:

“In its broadest sense a ‘structure’ is any production or piece of work artificially built up or composed of parts joined together in some definite manner, and in such sense a fence is a structure.”

In *Williams v. Mountaineer Gold Min. Co.*, 34 Pac. 702, 704, 102 Cal. 134, the following is set out, also quoted in Words and Phrases, Judicially Defined:

“The use of the phrase ‘other structure,’ in a statute providing that mechanics, etc., performing any labor upon or furnishing materials to be used in the construction, etc., of any building, wharf, bridge, ditch, flue, aqueduct, tunnel, fence, machinery, railroad, wagon road, or other structure shall have a lien, etc., shows that the word ‘structure’ comprehends, and is broad enough to include any similar things constructed, should the enumeration prove incomplete. The term does not seem to include a mine.”

In the case of *Giant Powder Co. v. Oregon Pac. R. Co.* (U. S.), 42 Fed. 470, 473, 8 L. R. A. 700, also quoted in

Words and Phrases, Judicially Defined, the following is set out :

“ ‘Structure’ as used in the act of 1885, giving a lien for labor and materials furnished in the construction of any building, ditch, flume, tunnel, and any other structure, meant anything that may be attached or built upon the realty, and hence included a railroad.”

In view of these decisions, we advise you, that a permit for the erection of a greasing rack for automobiles is necessary under Section 430 of the Chicago Municipal Code of 1922.

Respectfully submitted,

LEONARD J. GROSSMAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Application of Western Shade and Cloth Co. for Permit to Remove and Relocate Switch Tracks on Lumber Street North of West 22d Street.

June 11, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

Your communication of May 23, 1923, transmitting the application of the Western Shade and Cloth Co., for a permit for the removal and relocation of switch tracks in Lumber street, north of West 22d street, together with the file accompanying said application and your request for an opinion from the Law Department as to whether said permit should

be issued without the passage of a special ordinance, has been duly received.

On October 4, 1886, an ordinance was passed by the City Council granting permission to the Chicago, Burlington & Quincy Railroad Company, its successors and assigns,

“to lay down, maintain and operate a single track railroad upon Lumber street from the intersection thereof with the right of way of the Joliet and Chicago Railroad Company, southwesterly as far as said street is laid out. And also in, and upon 22nd street, from Brown to said Lumber street, with proper curve connecting the two tracks at junction of said 22nd street and Lumber street and with SWITCHES, TURNOUTS AND SIDE TRACKS necessary to accommodate the owners and occupants of property, now or hereafter located on both sides of said Lumber and 22nd street.”

This ordinance is also made subject to all general ordinances now in force, or may hereafter be passed concerning railroads in said City. Said ordinance in Paragraph 9 contains the following:

“Provided, further, that the right to operate that portion of said railroad track in 22nd street, lying between Brown and Halsted streets, shall terminate at the end of twenty years from the date of the passage of this ordinance.”

From the foregoing ordinance we see no reason why the Department of Public Works has not the right to issue a permit to build a switch terminal or side track to accommodate the owners and occupants of property located on both sides of said Lumber and 22d street.

For that reason we are of the opinion that you have a legal right to issue said permit to the Chicago, Burlington & Quincy Railroad Company provided, however, that the territory upon which said track is to be located is not within that territory described as “that portion of said railroad track in 22d street lying between Brown and Halsted

streets," inasmuch as the right to use that track expired October 4, 1906.

You also ask the opinion of this department as to whether this permit should be issued without the payment of the annual compensation as fixed by the Finance Committee for switch tracks in public streets.

Article 9 of Chapter 65 of the Chicago Municipal Code of 1922, being Section 3257 is as follows:

"There is hereby established a bureau in the Department of Public Works which shall be known as the Bureau of Compensation. It shall have jurisdiction in determining the rate of compensation where privileges are granted in streets, alleys and public places for all purposes according to fixed and established scales therefor, and shall act in an advisory capacity to the City Council in the matter of fixing such rates where no scale is established in the granting of such privileges by special ordinances. Said bureau shall embrace a superintendent of compensation, a title expert, and such other employees as the City Council may provide."

In the special ordinance granting the right to the Chicago, Burlington and Quincy Railroad under which this permit would be issued there appears to be no provision for compensation or scale established. The file before us contains no information as to whether or not, under the provision of Section 3257, any rate of compensation has been fixed, or if fixed, what rate in this particular matter.

We are, therefore, unable to answer the latter part of this question until we are further advised as to those facts.

Sincerely yours,

JOSEPH R. W. COOPER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Reinstatement of John C. McDonnell, Second Assistant
Fire Marshal and Chief of Fire Prevention and
Public Safety, and Jeremiah J. McAuliffe,
Fourth Assistant Fire Marshal.**

June 12, 1923.

HON. ARTHUR R. SEYFERLICH, Fire Marshal.

Dear Sir:

On September 23, 1922, an order was entered by the Civil Service Commission discharging John C. McDonnell from the position theretofore held by him as Second Assistant Fire Marshal and Chief of Fire Prevention and Public Safety, and Jeremiah J. McAuliffe from the position theretofore held by him as Fourth Assistant Fire Marshal. A petition for a writ of certiorari was filed in the Circuit Court and on December 16, 1922, the writ was awarded and these two men were ordered reinstated. From that order at that time the respondents in the certiorari petition prayed an appeal to the Appellate Court of Illinois for the First District.

At the request of his Honor the Mayor, I have gone into the matter of the charges against these two men, and the circumstances connected with their discharge very carefully, and have advised the Mayor that the records in these cases will not sustain their discharge, that the judgment of the Circuit Court was correct, and that we have no sufficient grounds for maintaining our appeal from the order of that court. Accordingly I have this day dismissed the appeals in both of these cases, and the order of the Circuit Court entered December 16, 1922, to reinstate these men is now in effect.

You are therefore advised that in compliance with the said order of the Circuit Court said John C. McDonnell should be forthwith reinstated as Second Assistant Fire

Marshal and Chief of Fire Prevention and Public Safety, and Jeremiah J. McAuliffe should be reinstated as Fourth Assistant Fire Marshal.

I understand that due to the appointment of Hon. Arthur R. Seyferlich as Fire Marshal, and the attempted removal of John C. McDonnell and Jeremiah J. McAuliffe, certain changes have been made in your department so that the positions formerly held by said McDonnell and McAuliffe are now being occupied by some one else. Such orders as have been made either by the Civil Service Commission or by the Fire Marshal, changing the status as existing in the Department September 23, 1922, will necessarily have to be cancelled and revoked so as to make it possible for you to comply with the order of the Circuit Court.

Will you please notify these two men at once of their reinstatement and their assignment to duty?

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

**Claim Against City of Relatives of Citizen Unlawfully
Killed by Police Officer.**

June 12, 1923.

HON. WM. E. DEVER, Mayor.

Dear Sir:

Your letter of June 5th, addressed to the Honorable Francis X. Busch, Corporation Counsel, transmitting a communication under date of June 1, 1923, from Mr. Cairolì Gigliotti, and a copy of your reply thereto, has been referred to the undersigned for attention.

So far as the legal phases in this unfortunate matter are concerned, it is well settled that there is no legal liability

on the part of the City for the act of the police officer, nor is there any way under the law in which the relatives dependent upon the young man who was killed can be relieved by appropriation of public funds. The question of the City's liability for the act of the police officer is settled in the following cases:

"Police officers are not agents or servants of the City within the meaning of the rule which makes Municipal Corporations liable for the acts of such agents or servants." *City of Chicago v. Williams*, 182 Ill. 135 (reversing 80 Ill. App. 33).

"Police officers appointed by a City are not the agents or servants so as to render it responsible for unlawful and negligent acts in respect to their duties." *Culver v. City of Streator*, 130 Ill. page 288 (affirming 34 Ill. App. 77). Supreme Court cites 58 Ill. 353.)

"Police officers are not agents or servants of the corporations appointing them, within the rule making the corporations answerable for their acts." *Arms v. City of Knoxville*, 32 Ill. App. 604 (citing 107 Ill. 334; 58 Ill. 353).

On the second proposition, there is no authority for the appropriation or payment of public funds for relief in such a case as this. We call your attention to the case of *Petersburgh v. Mappin, et al.*, 14 Ill., page 194. The court says in that case:

"The trustees of the town possess only such powers as are specifically conferred by the act of incorporation, or are necessary to carry into effect the powers expressly granted. They must keep within the limits prescribed by the charter. If they transcend the authority conferred thereby, their acts are not binding on the town or third persons. They have no power to give away the funds of the town, or appropriate them to purposes not warranted by the charter. They must faithfully apply the corporate property to the uses and objects specified in the charter. *As they cannot directly dispose of it by way of gratuity, so they cannot accomplish the same result by device or indirection.* They cannot, under color of a sale, transfer the property of the corporation without consideration; nor can they, under the pretence of satisfaction, discharge a debt due the corporation without payment."

In the case of *Agnew et al. v. Brall*, 124 Ill., page 314, the Supreme Court has said:

“(They) the City Council have no power to squander or give away the funds or property of the incorporation, but all property within their control, belonging to the incorporation, must be honestly applied to the uses and purposes specified in the act of incorporation. The City Council have no power to sell, or in any manner dispose of, the property of the incorporation without consideration.”

The two decisions of the Supreme Court above cited seem to have been generally recognized by the courts, and both cases are cited in the case of *Chicago v. P. C. C. & St. L. Railway Company*, 244 Ill. where the court says on page 230:

“Authorities of municipal corporations have no power to make donations to any individual or corporation, but the revenues are to be held for corporate purposes.”

We have been informed that there have been instances in extreme cases of need on the part of individuals who have been damaged by the wrongful acts of police officers where a way has been found to evade the law by having a suit started against the City and a settlement made.

We are of the opinion, however, that there can be no legal justification for such procedure as in view of the authorities above cited, such a suit could not be brought in good faith, nor could a settlement be made which would not be in direct violation of the law.

In accordance with your request, we are transmitting your letter together with the accompanying file and a copy of this opinion to the General Superintendent of Police.

Yours very sincerely,

JOSEPH R. W. COOPER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**City Comptroller Must Comply With Subpoena Duces
Tecum Issued by Grand Jury.**

June 13, 1923.

MR. LOUIS E. GOSSELIN, Deputy Comptroller.

Dear Sir:

Answering your inquiry of the 13th instant, in re grand jury subpoena *duces tecum* filed with the Comptroller, requiring him to produce certain vouchers, etc., showing payments by the City of Chicago to Adams-Beatty-Francois Corporation, before the Grand Jury on June 14, 1923, at 2 p. m., I beg to say that it will be necessary that the Comptroller, or some one representing him, appear before the Grand Jury at the time indicated with the documents in question.

Under the law, if the Grand Jury made the request it would be necessary that the Comptroller should leave the documents in the custody of the Grand Jury, but in order to avoid the possibility of the loss or misplacement of such papers, my advice would be to try and arrange with the Grand Jury so that the papers would remain in your custody subject to their request for production at such future time as they might need them. With regard to the last paragraph of your letter, I beg to say that in my opinion the law and sound public policy require that your office should cooperate with the office of the Attorney General in every way in such investigations as it sees fit to make.

Very truly yours,

FRANCIS X. BUSCH,

Corporation Counsel.

June 13, 1923.

Collection of Claims From the Various Utility Companies.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

I have your letter of the 11th instant, enclosing letter from Alderman Ross A. Woodhull, Chairman of the Committee on Finance, emphasizing the shortage of funds and suggesting that collection of moneys due from the various utility companies be vigorously prosecuted. In reply I will say that we have for collection the following large claims against various public utility companies:

CHICAGO TUNNEL Co.—Including claim against the Chicago Warehouse and Terminal Company (which may be a claim) the City claims that there is due it for compensation under ordinance of July 15, 1903, \$493,067.03. The details concerning this claim are given more particularly later on in this letter.

ILLINOIS BELL TELEPHONE Co.—City claims 3 per cent compensation on \$1,875,000.00, being the amount received from the U. S. Government on account of the guarantee during the government operation of the telephone plant.

NORTHWESTERN ELEVATED RAILROAD Co.—City claims compensation on the revenue which the Northwestern Elevated Railroad receives from the Chicago, North Shore & Milwaukee Railway under the Northwestern ordinance amounting to 2 per cent of the main line receipts, and also under the Union Loop ordinance amounting to 20 per cent of gross receipts based on $\frac{1}{2}$ ¢ per passenger carried.

WESTERN UNION TELEGRAPH Co., POSTAL TELEGRAPH Co.—Compensation is based on the equipment of these companies in the City streets. The U. S. District Court recently decided that the companies did not need to pay compensation on the unused conduit ducts which the ordinance intended to cover, and for which the Western Union Telegraph Co., had previously paid.

With regard to the claim against the Chicago Tunnel Co., I beg to say that I have had a conference with Mr. Daniel J. Schuyler, of the firm of Schuyler, Ettelson & Weinfeld, representing the company, and they take the position that there is due to the City from the Chicago Tunnel Co., the sum of \$201,979.55, which they are willing to pay now in cash. They say there is no money due the City on account of the gross receipts of the Chicago Warehouse & Terminal Co. Their theory in this case is that the Chicago Warehouse & Terminal Co., is a separate corporation having no contractual relations of any kind with the City of Chicago; that it has a contract with the Chicago Tunnel Co. by which it pays the Chicago Tunnel Co. 50c per gross ton for hauling its merchandise through the tunnel.

The Chicago Warehouse & Terminal Co. has the same officers, directors and stockholders as the Chicago Tunnel Co. My personal belief, based upon such facts as I have been able to gather together, is that the Chicago Warehouse & Terminal Co. was organized solely for the purpose of attempting by a legal subterfuge to deprive the City of a part of the compensation which would be due to it from the Chicago Tunnel Co. under the ordinance, if the Chicago Tunnel Co. charged its customers directly for the work done by it.

Based upon the gross receipts of the Chicago Warehouse & Terminal Co., according to available information, the City is entitled to \$291,087.48 in addition to the \$201,979.55 which the Chicago Tunnel Co. admits to be due. I am now having this entire matter thoroughly investigated as to the facts and briefed on the law. My intention is to file a bill for an accounting for the two sums, \$201,979.55 and \$291,087.48, since the Chicago Tunnel Co. is unwilling to pay the \$201,979.55 without getting a release of the entire amount claimed from both it and the Chicago Warehouse & Terminal Co.

With regard to the other claims above enumerated, they have been assigned to various members of the Law Department, and will be thoroughly investigated both as to the facts and the law involved, and vigorously prosecuted.

While Alderman Woodhull's letter contains a reference to certain of the payments that have been tendered by the traction companies, to the City of Chicago, I have assumed from your letter and because of the fact that you are entirely familiar with the status of these various tenders, that you did not desire any further information as to those items at this time.

I have taken the liberty of transmitting a copy of this letter to Alderman Woodhull.

Yours very respectfully,

FRANCIS X. BUSCH,
Corporation Counsel.

**Power and Authority of City to Substitute Fixed for
Movable Bridges Over Chicago River and
Liability for Damages for Such
Substitution.**

June 15, 1923.

COMMITTEE ON HARBORS, WHARVES AND BRIDGES OF CITY
COUNCIL OF CITY OF CHICAGO.

HON. GUY GUERNSEY, Chairman.

Dear Sir:

In response to your request we submit the following opinion on the following questions, to wit:

First: The power of the City of Chicago to substitute fixed for movable bridges over the Chicago River and its branches.

Second: Whether or not the City will be liable for the damages occasioned, if any, through such substitution.

We assume that the fixed bridges will be so constructed as to permit of the free passage thereunder of lighters, car-

ferries and barges and, while excluding from the river masted vessels, will not close the river to navigation. So assuming, we proceed to the consideration of the first question.

In our opinion to you of May 25th last, we held that there was nothing bearing on the question of the power of the State to substitute fixed for movable bridges contained in either the Virginia Act of cession (1784) of its claim to territory northwest of the Ohio, the Continental ordinance (1787) relating to the organization and government of said territory or in the Act of Congress (1818) providing for the admission of Illinois into the Union. In effect we found, therefore, that Illinois has full sovereign power with respect to its waterways, except in so far as such power has been surrendered to the United States by the federal constitution.

Among the powers granted to Congress by the federal constitution is the power to "regulate commerce with foreign nations and among the several states." By this grant of power by the various states congress has paramount control over the navigable waters of the states and the navigation thereon.

The congressional regulatory power over commerce is perhaps brought to public notice most frequently through its exercise in relation to lakes, and rivers and other avenues of water transportation. However, the power applies with equal force to roads and railroads and other avenues of land transportation.

In the case of *Gillman v. Philadelphia*, 70 U. S. 3d Wall., p. 729, the court says:

"Bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and the commerce which passes over a bridge may be much greater than would be transported on the water it obstructs."

The case cited related to construction of a fixed bridge, one excluding masted vessels, by the City of Philadelphia across the Schuylkill River, which the decision upheld.

Further authority as to the power of congress to promote land commerce, even though a restriction of navigation, is found in *Pennsylvania v. Wheeling, etc., Bridge Company*, U. S., 18 Howard, p. 421, relating to a fixed bridge across the Ohio River. In this case the Federal Supreme Court had decided that the bridge interfered with navigation and had ordered it either removed or raised, within a fixed time, so as to provide adequate clearance but, during the pendency of the proceeding, congress declared the bridge to be a lawful structure in its "present" position and elevation and required navigators to so regulate their vessels, as not to interfere with the bridge. The court thereupon held that the act of congress was "within the legitimate exercise, by congress, of its constitutional power to regulate commerce."

Chicago is undoubtedly the greatest gateway of the nation's interstate commerce. It is the terminal and interchange point of transcontinental railroads and water carriers. This interchange is made in carload and less-than-carload lots and by truck, car ferries and lighters, and much of the land interchange, both by rail and wagon road, crosses the river. It is within the powers of congress to facilitate this interchange by authorizing fixed bridges across the Chicago river.

Section 9 of the River and Harbor Act approved March 3, 1899, provides that bridges may be built under authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided that the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. (Barnes Federal Code 1919, Par. 9437, p. 2272.)

While the Chicago river lies wholly within the limits of this state, it is a link in the waterway from the lakes to the Gulf of Mexico and hence the Chicago river may be an interstate and not an intrastate waterway within the meaning of the act last quoted. For reasons herein later developed it seems unnecessary, at this time, to attempt to determine whether the Secretary of War has been given, or whether

Congress has retained the power, to determine what bridges may be built across the Chicago river.

The congressional act stipulates that the bridges must be built (with federal sanction) under authority of the state legislature and, hence, we address ourselves next to the question of what authority the State has given the City with respect to the construction of bridges.

Article V of the Cities and Villages Act, as amended by an act approved June 30, 1921 (Smith's Ill. Rev. Statutes 1921, p. 211), provides:

"Sec. 1. The city council in cities, and the president and the board of trustees in villages, shall have the following powers:

* * * * *

"Seventh—to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds and vacate the same.

"Ninth—To regulate the use of the same.

"Twenty-eighth—To construct and keep in repair bridges, viaducts and tunnels and to regulate the use thereof.

"Thirtieth—To deepen, widen, dock, cover, wall, alter or change channel of watercourses.

"Thirty-third—To regulate and control the use of public and private landing places, wharves, docks and levees.

"Thirty-fourth—To regulate and control the anchorage, moorage and landing of all watercraft and their cargoes within the jurisdiction of the corporation.

"Thirty-eighth—To make regulations in regard to the use of harbors, towing of vessels, opening and passing of bridges."

From the foregoing quotations from the Cities and Villages Act it will be seen that the legislature has granted to the local authorities very broad powers with respect to highways of commerce both over land and water. Chicago may extend its streets across the river by bridges, it may regulate the use of bridges and of harbors. The legislative sanction is even given to "cover * * * watercourses." Neces-

sarily, all these powers are subject to the paramount control of commerce by congress.

A company owning steam vessels that were principally employed in carrying iron ore from Escanaba to docks on the Chicago river brought suit to enjoin the City of Chicago from enforcing its ordinance closing the bridge-draws during a fixed hour each morning and evening and to compel the City to remove piers and bridges which the company alleged were in obstruction to navigation. (See *Escanaba Company v. Chicago*, 107 U. S., p. 678.) The court, affirming the decree below which denied the relief asked, said (p. 683) :

“The Chicago River and its branches must be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

“But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the City of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that City, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the City upon whom it has developed that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstructions. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legisla-

tion in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary."

It seems necessary to next inquire whether fixed bridges over the Chicago river will be in conflict with the public policy of the state.

The Act of 1889, under which the Chicago Sanitary and Ship Canal has been constructed from Robey street to Lockport, provides for minimum depth of 18 feet and width, at bottom, of 160 feet through rock sections and for movable bridges.

The Act of 1919 for the Illinois Waterway from the Sanitary Canal at Lockport to Utica on the Illinois river provides for a channel of a depth of not less than 10 feet in rock sections and of not less than 14 feet over mitre sills of locks; and said act, through not requiring movable ones, permits fixed bridges.

Having in mind that the Chicago river to Robey street, the Sanitary Canal to Lockport, and the Illinois Waterway to Utica are all links in the chain of waterway from lakes to gulf, it seems clear that the Act of 1919 modifies the State policy as shown by the Act of 1889 and leaves no bar, through State policy, to the adoption of fixed bridges over the Chicago river. On the contrary, the adoption of fixed bridges will be in line with the State public policy as expressed by the 1919 act.

The assent of the State to the construction of fixed bridges across the Chicago river, when authorized by Congress, is given (Smith's Ill. Rev. Statutes, 1921, Chap. 121, Par. 192, page 1718) by the following act approved April 4, 1872, as amended by an act approved June 1, 1889, to wit:

"Sec. 1. Be it enacted * * * Sec. 1. That the assent of the State of Illinois is hereby given any corporation and association organized under the laws of this state, and subject thereto, to construct bridges across navigable rivers in this state, and upon the boundaries thereof, whenever authorized by the Congress of the

United States, under such conditions and restrictions as the Congress may impose; Provided: (Here follows a provision relating only to bridges over the Ohio and Mississippi rivers).''

We are, therefore, of the opinion that the City of Chicago has the power to construct fixed bridges over the Chicago river and its branches whenever authorized so to do by Congress.

We take up next the question of whether or not the City will be liable for the damages occasioned, if any, through the substitution of fixed for movable bridges, over the river.

Assuming that the piers and abutments of the fixed bridges will be so placed and proportioned as to not materially diminish the flowage capacity of the river, it is not necessary to inquire whether or not the Sanitary District has flowage rights in part of the Chicago river.

The exclusion from the Chicago river of vessels requiring greater headroom than that which will be provided under fixed bridges will be a restriction on the navigation which is now conducted thereon which will affect:

1. Owners of vessels of the excluded types,
2. Shippers by such vessels, and
3. Owners and users of land along the river and along the Sanitary Ship Canal.

And, in fact, though in a lesser degree, the restriction will affect all lands on the Desplaines, Illinois and Mississippi rivers and on the navigable rivers tributary to those named, which, though not now accessible thereto, may, through later waterway improvements, become accessible to vessels engaged in the lake carrying trade.

The law of waters has almost endless ramifications. It applies to waters at their source, the springs and mountains, and to the waters of the high seas. It ranges from local to international questions. In our land it divides into the powers granted congress and those reserved to the states and acquires a semi-double sovereign aspect, with the congress-

sional power supreme and that of the state subordinate as to the powers granted the Union. Its particular concern is with the promotion of public welfare but, in this individual rights are an important element. Public welfare is controlled by local needs. Waters are most useful in some states for irrigation, in others for navigation, in some for log rafting and in others for power development, in some for commercial fishing and in others for sewage run-off and so on in endless variety. From all this it but follows, naturally, that the rights in water, public and private, are substantially variant in different states and are differently comprehended by not only the public but by counsel and court. In our effort to interpret the private rights of owners of land along the Chicago river, we will have in mind that the City Council desire to treat fairly both the public and the individual and that it is better to endeavor to state these rights in popular rather than technical terms—relying upon this effort in excuse of the length of this opinion.

We all know that we have the right to row upon public waters. If we come to a highway bridge we either go under, “ducking” if necessary, or if too low for passage, we either portage around or go back. We may feel that the bridge should have been built higher but we recognize that land travel has its rights as well as we on water have ours and that the right to regulate must be in the public authorities. Such, simply stated, we believe to be the right of navigation whether by canoe or steamer.

Again, we know that if we land on a strange shore our position is uncertain—the proprietor may order us away but that if we land on our own shore we may “nose” our boat in and let it project into the river—provided we leave ample room for others to pass. The right of others to pass is paramount and if necessary we must pull our boat out of the way. Such we conceive is the right of landing.

It concerns us little, either in the exercise of our right of navigation or landing, whether the bed of the stream belongs to the owners of the lands along the river and is subject

to the public, including our right of navigation or belongs to the State subject to the public, including the shore owner's right of navigation. Under either State or private ownership of the bed of the river the right of travel is first and that of landing secondary.

From Cooley on Constitutional Limitations, 7th Ed., p. 781, we quote the following:

"Any proper exercise of the powers of government which does not directly encroach upon the property of an individual or disturb him in its possession or enjoyment, will not entitle him to compensation or give him a right of action.

"If, for instance, the State, under the power to provide and regulate the public highways, should authorize the construction of a bridge across a navigable river, it is quite possible that all proprietary interests in land upon the river might be injuriously affected; but such injury could no more give a valid claim against the State for damages than could any change in the general laws of the State, which, while keeping in mind the general good, might injuriously affect particular interests."

Gould on Waters (2d Ed., p. 305) after having stated that a riparian owner has a right to the water frontage belonging by nature to his land, "although the only practical advantage of it may consist in the access thereby afforded to him to the water, for the purpose of using the right of navigation," proceeds as follows:

"This right is limited to the right to enter from one's own estate upon the highway and to pass from the highway to one's own estate, and does not include the right to redress for an obstruction which is not against the front of the plaintiff's land, even when it entirely closes the highway."

And the same author on page 272 says:

"In general, the erection of a bridge over navigable waters, with or without a draw, by authority of the legislature, is a regulation of a public right and not the deprivation of any private right which can be ground for damages to individuals."

In an action to recover damages for the obstruction of a navigable stream by the construction thereover of a railroad bridge without a draw, brought by one who owned a wharf above the bridge which wharf he used in connection with his occupation of master-mariner and coaster and of transporting merchandise by water to and from his wharf, and of storing the goods thereon, the court held that plaintiff was entitled to the navigation of the stream only in common with the whole public, that it did not appear that the consequential damage to him, who at the time alone navigated the stream, was different in kind than that which other riparian proprietors and the rest of the public would suffer, whenever they used the stream and that no action for recovery could be maintained.

The court pointed out that the case had no analogy to those in which the obstruction in a navigable stream against the front of his land entirely cuts off his access to the stream and thereby causes a direct and peculiar injury to his estate.

Blackwell v. Old Colony Railroad Company, 122 Mass., page 1.

Philadelphia is divided by the Schuylkill river. The City began the erection of a bridge without a draw and so low that masted vessels could not pass to a coal dock just above the bridge. Gillman, the owner of the dock, and a resident of another state, filed a bill in the United States Circuit Court alleging that the bridge would specially damage his property and asking an injunction to stop the erection. The court dismissed the bill and its decree was affirmed in the United States Supreme Court.

The opinion by the upper court concedes that Gillman's wharf is valuable and productive, that it is situated on a river navigable by vessels drawing 20 feet of water and that commerce to and from the dock has been carried on in all kinds of vessels for many years and that the bridge will prevent the passage of vessels having masts and will largely reduce the income from and the value of the wharf; but the court finds that a large city is rising upon the opposite side

of the river and that the new bridge is called for by public convenience and that the injury to the wharf is entirely consequential.

Gillman v. Philadelphia, 70 U. S. (3d Wall), p. 713.

The right of navigation is a natural right enjoyed in common and on equal terms by the public. A shore owner enjoys the right as one of the public and not as a shore owner and hence the right is not one of property. From the moment a boat casts off from his dock it proceeds under the public rights and has lost touch with the private rights of the dock. This view is supported, though perhaps reluctantly, by Lewis on Eminent Domain, 2d Ed., Vol. 1, p. 116, as follows:

“*Rights of riparian owners on public waters.*—There is not more diversity of opinion among the courts as to the title to the bed and shores of navigable streams and waters than there is as to the rights of riparian owners in such waters as are conceded to be entirely *publici juris*. The older, and perhaps more numerous, authorities hold that such an owner has no private rights in the stream or body of water which are appurtenant to his land, and, in short, no rights beyond that of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public has in common, and that he has access to the waters over his own land, which the public do not. The stream is regarded as an adjoining freehold, the title to which is absolutely in the public, and which the public may use and control in the same manner as an individual could if the stream was his private property. Access to and use of the stream by the riparian owner is regarded as merely permissive on the part of the public and liable to be cut off absolutely if the public see fit to do so.”

And on p. 118, Lewis quotes Wood on “Nuisances” to the effect that a riparian owner, as such, has no more right than other members of the public in the stream, and has no *jus privatum*, or special usufructuary interest, in the water.

A study of the authors quoted, other writers and the court decisions indicates a diversity of opinions as to what

are riparian rights but a general acceptance of the view that the right of navigation is public and not a riparian right. The scarcity of decisions on that point is due to the general acceptance of the rule. All cases found support it unreservedly.

In fact, a different rule seems inconceivable by reason of the consequences that would follow therefrom for if the right of navigation were a private right in property every owner along the Mississippi river might be damaged by a bridge at any point on the river and national development through bridge construction would be greatly retarded through the possibility of attendant liability for damages to the riparian owners.

The case of *Scranton v. Wheeler*, U. S., 179, p. 141 *et seq.*, related to the question of whether or not the United States is required to compensate an owner of the land fronting on a public navigable river when his right of access from the shore to the navigable part of such river is permanently obstructed by a pier erected in the river under authority of Congress for the purposes only of improving navigation. In that case it is conceded that under the law of Michigan the title to the submerged land is in the adjoining owner to the thread of the stream. This is true also in Illinois.

The case stood controlled by the question of what is private property within the meaning of the Fifth Amendment of the Constitution relating to the taking of private property for public use.

The court affirmed the judgment of the Supreme Court of Michigan holding that the United States is not required to make compensation in the case stated and three of the justices dissented on the ground, as we comprehend it, that the right of access to the navigable waters is a private right incident to riparian ownership which right must be distinguished from the mere right of navigation which is one which a riparian owner has as one of the public.

In other words, the court was agreed that the right of navigation is a public right and not a private right.

Having reached the conclusion that the right of navigation in the Chicago river is a public and not a private right we can have but one opinion, and that is that the substitution of fixed bridges for movable ones over this river, by lawful authority, is a mere restriction on or regulation of the right of navigation and is not the taking or damaging of private property. In other words, the City will not be liable for damage to navigators, shippers or shore owners for any inconvenience or pecuniary loss they may sustain by reason of such substitution of fixed for movable bridges.

Yours very truly,

BENTON F. KLEEMAN,
Special Assistant Corporation Counsel.

Approved: .

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of Board of Education to Pay City Elevator Inspection Fees.

June 20, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

On June 8, 1923, you requested an opinion from this department on the question of the liability of the Board of Education for the payment of warrants for collection rendered on account of elevator, boiler and building inspections made by the City. Practically the same question has frequently arisen in the past and in each instance brought to the attention of this department our opinion has been that the Board of Education, with respect to those purposes for which it is regarded as subject to municipal control, occupies the same position as an ordinary individual and is equally liable for the payment of fees for services rendered it by the

City. (See Opinions of The Corporation Counsel, Vol. 1915-1916, at page 622, and Vol. 1920-1923, at page 249.)

Section 3658 of The Chicago Municipal Code of 1922 provides for the inspection and certification of steam boilers and steam plants owned, operated or controlled by the City or the Board of Education, and it then goes on to expressly provide that "no fees shall be charged or paid to said department nor to any employe under said department for the inspection of any steam boiler or steam plant or for the certificate of inspection issued by said department for any steam boiler or steam plant owned, operated or controlled by said city." Thus, while the inspection provisions relate both to the City and the Board of Education, the provision relating to exemption from payment of fees relates only to the City and not to the Board of Education.

Notwithstanding the fact that the Board of Education is not, technically, a part of the municipal government but is a separate corporation, the municipality may exercise over it the police power which it derives from the State and which authorizes the making and enforcement of reasonable regulations concerning health, safety and public morals.

County of Cook v. City of Chicago, 311 Ill. 234.

City of Chicago v. Wright, 69 Ill. 318.

Culver v. City of Streator, 130 Ill. 238.

City of Chicago v. Williams, 182 Ill. 135.

Johnston v. City of Chicago, 258 Ill. 494.

Elevator, boiler and building inspections clearly come within the police power of the municipality, and the Board of Education is bound to observe valid ordinances relating thereto. The City Council has seen fit to prescribe certain building regulations for buildings of Class VIII, which includes all buildings used for school purposes. (The Chicago Municipal Code of 1922, Sections 695 to 713, inclusive), and to provide for the inspection of such buildings by the City. It has been held by our Supreme Court that an inspection is presumably beneficial to the person whose property is inspected, and the right to make such inspection carries with

it the right to charge inspection fees, which may be required to be borne by those presumably benefited by such inspection.

People v. Harper, 91 Ill. 357.

C. W. & V. Coal Co. v. People, 181 Ill. 270.

In view of the facts, we are of the opinion that the Board of Education is liable for the payment of inspection fees chargeable by reason of inspections made by the City in the exercise of its police powers.

Very truly yours,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Necessity of Amusement License for Public Golf Course Charging Fee.

June 21, 1923.

HON. THOMAS P. KEANE, City Collector.

On June 5th you requested that this department render an opinion as to whether an organization conducting a golf links on grounds located within the City where the general public is permitted to play, which charges an admission fee, is required to obtain an amusement license therefor.

The authority of a municipality to license any occupation or require the payment of a fee for the privilege of conducting an enterprise must either be expressly granted in the charter or must be a necessary incident to a power so granted.

Wilkie v. City of Chicago, 188 Ill. 444.

City of Chicago v. M. & M. Hotel Co., 248 Ill. 264.

City of Chicago v. Ross, 257 Ill. 76.

People v. City of Chicago, 261 Ill. 16.

City of Chicago v. Mandel Bros., 264 Ill. 206.

Condon v. Village of Forest Park, 278 Ill. 218.

Section 1 of Article 5 of the Cities and Villages Act gives to the City Council whatever legislative powers it possesses. Clause 41 of that section gives to the City Council the power to license, tax and regulate amusements, among other things, and it is only in this clause, if any, that there could be found the power to license golf courses. The only question then is, whether golf can be considered as an amusement in the sense that it may be licensed by the City by reason of the fact that it is a proper subject for regulation.

This question has been squarely passed upon by our Supreme Court in the case of *Condon v. Village of Forest Park*, 278 Ill. 218. In that case the Village of Forest Park sought to enforce an ordinance requiring the payment of a license fee by any person conducting golf links where a fee was charged for the use of such links. In passing upon the question of the right of the village to pass the ordinance in controversy, the court said:

“The game of golf is a healthful and harmless recreation of the same class as lawn tennis and other like games, which do not attract crowds or tend to disorder or call for police supervision or regulation. It has never been known to affect in any injurious way the public health, order, safety or morals. The fact that the game has attractions which induce players to practice it does not change its character to an amusement or entertainment provided for the public. It is not a subject for the exercise of the police power.

“If it is within the power of the General Assembly to impose a tax by way of license on the business of having or conducting a golf course by an individual, club, association or corporation, uniform upon all of the class, as required by the constitution, the final question is whether the General Assembly intended to confer such power upon cities and villages by Paragraph 41. We have seen that golf is not an amusement in fact, within the meaning of that paragraph, and it cannot be in-

cluded under the settled rule of construction adopted for the purpose of ascertaining the legislative intent. The paragraph specifies theatricals, followed by the words 'and other exhibitions, shows and amusements,' and in such a case the general words of description are limited to things of the same class or nature as those specified. Golf, lawn tennis, hockey and other like games bear no likeness to public shows and amusements of the same nature as theatricals, and therefore it cannot be said that the legislative intent was to include them as subjects or objects of taxation."

In view of this decision, we are of the opinion that the City could not compel the taking out of a license by persons conducting a golf links even though an admission fee is charged for the use thereof.

Very truly yours,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Refund of Money Deposited to Pay Fines in the Municipal Court.

June 22, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your communication of June 22, 1923, enclosing the file in the matter of the claim of Charles

L. Nelligan for refund of money deposited to pay fines in The Municipal Court of the City of Chicago.

It appears from the file submitted that Mr. Nelligan advanced the sum of \$103 in three cases pending in the Municipal Court, to wit:

City of Chicago v. John Newton, No. 1433184, in which Mr. Nelligan advanced the sum of \$31.

City of Chicago v. John Healy, No. 1433188, in which Mr. Nelligan advanced the sum of \$56, and in the case of

City of Chicago v. William Brooks, No. 1433189, in which Mr. Nelligan advanced the sum of \$16.

The file contains a certified copy of the order of the Municipal Court in each of these three cases, setting aside the judgment entered by the court and discharging each of the three defendants.

The fines and costs above mentioned were paid by mistake by the clerk of the Municipal Court into the City treasury. The City has no claim for this money which belongs to Mr. Charles L. Nelligan, and the same should be refunded to Mr. Nelligan.

We are of the opinion that the order to pay this claim, which is contained in this file, is a proper one and that the order should be made.

Very sincerely yours,

JOSEPH R. W. COOPER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Refunds on Account of Fines and Forfeitures Later Remitted.

June 22, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Under date of June 9, 1923, you send to us a list of cases in which the Committee on Finance submitted to the City Council, with recommendations for passage, orders for refunds for fines and forfeitures first entered and afterwards vacated by the Municipal Court.

You ask what authority the City Council has to make such refunds, and whether it can properly take such action under the circumstances presented.

We are of the opinion that the City Council has authority to make such refunds, and where a duly certified transcript of the order of the Municipal Court showing that the fine or forfeiture has been vacated is presented, the party so presenting same is entitled to the refund.

We do not consider it necessary to take up in detail each of the particular instances cited, but will state the general rules which govern these matters.

Under Section 21 of the Municipal Court Act it is provided that every judgment, order or decree final in its nature is subject to vacation, or it may be set aside or modified, upon motion duly made and entered within thirty days from the date of such final judgment, order or decree, in like manner and to the same extent as in the case of a similar motion made within the judgment term in the Circuit Court.

Hence, it is clear that the court has jurisdiction in a case after final judgment is entered for a period of thirty days, and may reverse itself if it sees fit to do so. If the payment

of the fine has been made in the meanwhile, either to avoid arrest or detention or through deduction of the amount from a cash bond, the payment cannot be regarded as such a voluntary payment as would preclude the recovery of the money if the court later on should hold that the fine should not be exacted.

The same rule holds good in regard to forfeited bonds. Under Section 50, if a proper showing is made in apt time (thirty days) the court may set aside a forfeiture of bail or cash deposit. It is provided, further, that the clerk "shall hold any money ordered forfeited as aforesaid during the time that such forfeiture is subject to be so set aside." In such a case, therefore, it is the duty of the clerk to hold the forfeited cash bond for thirty days; but if for some reason the clerk turns in the money and later, within thirty days, the judgment is set aside, the money may be recovered.

There is only one other question in these cases, that is, whether the jurisdiction of the court still attached at the time the court vacated the order. It is quite possible—in fact it would almost seem likely from the memoranda of the records presented to us in your letter—that in some of these cases the court took action after its jurisdiction had ended. In such a case, of course, there should be no refund. If in any case it appears from the record that the court acted after its jurisdiction had ended the order vacating such judgment may be ignored.

We therefore beg to advise you that the proposed refunds are proper and that the proposed action will be valid.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Suggestions as to Charges Against Civil Service Employes and Hearings Thereon.

June 26, 1923.

HON. NICHOLAS R. FINN, President, Civil Service Commission.

Dear Sir:

In line with our conversation of this morning, I beg to submit a few suggestions in regard to charges against Civil Service employes and hearings on said charges which might tend to eliminate unnecessary litigation in the future.

1. Charges against Civil Service Employes shall be properly drawn and submitted to Mr. C. Hjalmar Lundquist, Assistant Corporation Counsel, for his approval before filing them with the Civil Service Commission (charges to be made out in quadruplicate).
2. The Civil Service Commission shall then cause a copy of such charges and specifications to be served on the employe affected.
3. Notice to the said employe shall state the time and place where the investigation shall be held in accordance with Section 12 of the Civil Service Laws and Rules for the City of Chicago.
4. Said notice shall be served on the said employe five days or more prior to the said investigation or hearing, and at the hearing it must be established by evidence that such notice was served on the accused five days before said hearing.
5. The said employe shall appear in person and has the right to be heard in his own defense. He also has the right to be represented by counsel.
6. Charges and specifications shall be definite, certain and sufficient, and must clearly and with reasonable detail inform the employe under charges of the grounds for said charges so that he may properly prepare his defense.
7. Attached to the charges, when filed with the Civil Service Commission, shall be a statement by the employe under charges, and statements by all witnesses, duly signed by these respective persons in quadruplicate.

8. With regard to all matters stated in all said charges and specifications evidence must be offered before the Civil Service Commission, at the hearing aforesaid, supporting, sustaining and proving, or tending to prove, the allegations stated in said charges and specifications, in order that the alleged offense will be legally established. The evidence presented must show conclusively that the accused is guilty as charged.
9. The hearing must be fair and impartial.
10. Rules governing trials at law shall be observed at the hearing.
11. No prejudicial evidence shall be allowed to be introduced.
12. The employe under charges shall have the right to rebut all evidence presented by witnesses in his defense or otherwise.
13. The evidence must be sufficient *prima facie* to establish the charges against the accused.
14. The hearing must be conducted free of fraud, bad faith and unfairness on the part of the Commission.
15. The Commission shall not pre-judge and pre-determine the charges, nor show any attitude during the hearing that will indicate bias against the accused.
16. Incompetent and inadmissible evidence, such as hearsay evidence, etc., shall not be received and acted upon.
17. The stenographer employed at the said hearing shall transcribe his notes immediately following said hearing, and these notes as transcribed with proper affidavit of the stenographer attached to same shall constitute part of the records in the case.
18. Should the record of the hearing be brought to a superior tribunal for inspection, this tribunal will determine whether the Civil Service Commission had jurisdiction of the parties and of the subject-matter, and whether it has exceeded its jurisdiction, or has otherwise proceeded in violation of law. The record must show facts giving the inferior tribunal jurisdiction and mere conclusions of law are not sufficient.
19. A finding by the commission simply saying, "Whereupon the Commission heard the evidence offered and having considered all the evidence adduced herein, we find therefrom that the said is guilty as charged in the within and foregoing charges" is a mere conclusion of law. The finding must show that charges were filed in due form; that

notice was served upon the accused five days or more previous to the hearing; that the accused was served with a copy of the charges; that he appeared in person at the hearing and was represented by counsel, that all witnesses were sworn, that the Commission had jurisdiction over the person of the accused and over the subject-matter and must specify the charges of which he was found guilty as "conduct unbecoming a police officer or employe of the Police Department." The court must be able to see from the record that the conclusion of the Commission is true. A quasi-judicial tribunal of inferior jurisdiction (such as the Civil Service Commission) must recite the facts, or preserve the facts themselves upon which its jurisdiction depends.

Very truly yours,

CARL H. LUNDQUIST,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Exemption of Charitable Hospital From Payment of Water Rates.

June 29, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your request for an opinion from the Corporation Counsel as to whether the Streeter Hospital is entitled to exemption from water rates at their address, 2646 Calumet avenue, Chicago, Illinois. We have also been furnished with the application of said hospital, undated, for such exemption.

Section 4128 of the Chicago Municipal Code of 1922, provides as follows:

"4218—*Property that may be exempted from payment of water rates.*) The Commissioner of Public Works may exempt from the payment of water rates property herein enumerated as follows:

(a) Such property as is used in the immediate conduct or carrying out of the purposes of any charitable, religious or educational institution, if application be made for such exemption to the commissioner of public works in the form prescribed by him, and if it shall appear to the satisfaction of said commissioner that such property is not used for gain or profit, or rented, conducted, operated or maintained for the purpose of producing revenue. As a prerequisite for the granting of such exemption, the commissioner of public works shall upon demand be provided with access to the financial records of such institution. Nothing contained in this paragraph shall be held to exempt property of the United States of America, of the State of Illinois, or of any of its political subdivisions except as hereinafter mentioned." * * *

It will be observed that this ordinance makes no distinction as to whether the institution is a corporation, individual or an association. It merely requires that such property must be "used" exclusively for charitable, religious or educational purposes.

The application for exemption from water rates by the said Streeter Hospital states that "20 per cent of the work performed is charitable."

We are of the opinion that you should be furnished with more information to the effect that the said Streeter Hospital is an exclusive charitable institution before granting the application for exemption from water rates.

Yours very truly,

THOMAS W. FLYNN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Classification of License Provisions as to Probability of Enforcement.

June 29, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In compliance with a request from the superintendent of the department of license we have gone through all the license provisions of The Chicago Municipal Code of 1922, with a view to determining the probability of enforcing such provisions and collecting the license fees provided for. As a result we have prepared the following list which should be read in connection with the classification as follows:

A. Those cases where the City has direct authority to license. Under this head we put all that can reasonably be regarded as within the express power.

B. Those cases which we believe we can sustain under general powers or under a combination of express powers.

C. Those cases where authority to license is very doubtful, but which we do not regard as entirely hopeless.

D. Those cases in which there is no chance to sustain the power to license.

Acetylene Gas	A.	Bottle Dealers	A.
Advertising Agency	D.	Blasting Materials	A.
Air Rifles	B.	Bowling Alley	A.
Ambulance	B.	Brick or Clay Products	B.
Amusements	A.	Brokers	A.
Auctioneer	A.	Calcium Carbide	A.
Automobile Repair Shop	C.	Candy Sales Agency	D.
Automobile Salesroom	D.	Cartridge and Shells	B.
Bakery	A.	Catch Basin or Sewer	
Barber Shop	B.	Cleaners	B.
Bathing Beach	B.	Catteries	B.
Beverage Dealer	C.	Chemical or Paint	
Billiard Room	A.	Factory	C.
Bill Posters	C.	Cigarettes	A.
Birds, Dogs and House-		Coffee Houses	A.
hold Pets (Dealers in)	B.	Coffins	D.
Boiler Tender	B.		

Commercial, Collection and Claim Agency	D.	Garage (Public)	C.
Cosmetic, or Therapeutic Establishments	C.	Grain Elevator	D.
Crockery Store	D.	Gun Clubs	A.
Cotton, Wool, etc., Stores	D.	Gunpowder—Sale of	A.
Dancing Schools	D.	Hardware Store (Retail)	D.
Deadly Weapons	B.	Hardware Store (Wholesale)	D.
Detective Agency	A.	Home	A.
Dispensary	A.	Hospital	A.
Dogs	A.	House Mover	C.
Dog Kennel	B.	Hydrogen or Oxygen	B.
Drain Layer	B.	Ice Cream Parlor	A.
Driver of Public Vehicle	A.	Ice Dealer	C.
Drug, Chemical or Paint Store (Wholesale)	C.	Itinerant Candy Vendor	A.
Drug Store (Retail)	B.	Insurance Adjuster	D.
Drug Store Permit to Sell Liquor	A.	Itinerant Merchant	D.
Dry Cleaner or Spotter	B.	Jeweler	D.
Dry Cleaner (Certificate of fitness)	B.	Junk Dealer	A.
Dry Goods Store	D.	Junk Stores	A.
Dynamite	A.	Junk Yards	A.
Elevated Railway Cars	A.	Laboratory	B.
Employment Agency	D.	Laundry	B.
Engineers (Stationary)	A.	Laundry Vehicle	B.
Excavators	B.	Leather and Leather Products (Wholesale)	D.
Explosives	A.	Livery Stable	A.
Explosives (Certificate of Fitness)	B.	Lumber Yard or Box Yard	A.
Factory or Workshop	C.	Lumber Dealer without Yard	B.
Filling Station	A.	Manufacturing Confectioner	C.
Fireworks	A.	Meat Dealers	A.
Florist (Wholesale)	D.	Mason Contractors	A.
Florist (Wholesale Commission)	D.	Merchandise Brokers (If ordinance is amended to include brokers only)	A.
Food Establishment (Retail)	A.	Manufacturers' Agent	D.
Food Establishment (Wholesale)	A.	Mercantile Establish- ment (Wholesale)	D.
Furniture Mover	A.	Merchandise Store (Retail)	D.
Furrier	D.	Milk Dealer	B.
Garage (Private)	C.		

Motion Picture Films		Restaurant	D.
(Storage of)	B.	Rifle Range	A.
Certificate of Fitness		Roofer's Vehicle	B.
(Handling)	B.	Sale Stable	B.
Certificate of Fitness		Sash, Doors, etc. (Mfrs.)	C.
(Carrying or trans-		Sawdust and Shavings	B.
porting)	B.	Scavenger (Night Soil)	B.
Motion Picture Operator	B.	Scavenger (Offal)	B.
Motion Picture Studio or		Scavenger (Private)	B.
Laboratory	B.	Second Hand Clothes	
Natatorium	B.	(If Itinerant Dealer)	A.
Nursery	B.	Second Hand Store	A.
Oil, Peddlers	B.	Seed Merchant	D.
Ordinary	A.	Sewer Cleaners	B.
Oxygen or Hydrogen		Shooting Gallery	A.
Generation	B.	Sign Painters	C.
Paint Store	C.	Slaughtering, etc.	A.
Paper and Stationery		Soap Making	A.
Establishment		Soft Drink Manufacturer	
(Wholesale)	D.	or dealer	B.
Paving or Roofing		Tannery	A.
Materials (Factory)	B.	Ticker	C.
(Sales Agency)	D.	Tobacco Dealer (Whole-	
Pawnbroker	A.	sale)	B.
Peddlers (All kinds)	A.	Toy Fire Arms	B.
Photographer	C.	Trader in Grain	D.
Pianos	D.	Undertaker	A.
Pool Room	A.	Vehicle Shop (Vehicle)	D.
Public Cart	A.	Vehicle Tax	A.
Public Passenger Vehicle	A.	Veterinary Hospital	A.
Public Place of Amuse-		Water Tenders	A.
ment (if entrance fee		Waste, Cotton, Wool and	
is required)	A.	Tailor's Trimming	
(If operated as restau-		Store	D.
rant)	D.	Weapons	B.
Publisher's Representa-		Wearing Apparel Shop	D.
tive	D.	Weighmaster (Public)	A.
Real Estate Broker	A.	Window Cleaner	C.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Validity of the Public Weighmaster's Ordinance.

July 5, 1923.

HON. CARMAN VACCO, Inspector, Weights and Measures.

Dear Sir:

The Law Department is in receipt of your communication of May 3, 1923, in which you ask us for an interpretation of Article 2 of Chapter XC of the Chicago Municipal Code of 1922, the same being generally known as the Public Weighmasters' ordinance, and for a ruling as to the proper procedure to be followed in prosecuting the violations of this ordinance. We have not hitherto replied to this communication inasmuch as there was some question whether the Illinois Legislature would pass an amendment to the Cities and Villages Act defining specifically certain powers of the cities which would remove any question which might be raised concerning the validity of this ordinance. There has been no change however in that act which would affect this particular question.

In your letter you state that Mr. Delbert A. Clithero, as counsel for the Wisconsin Lime and Cement Company and about fifty other dealers, has advised you that he has rendered an opinion to his clients, that the ordinance in question was unconstitutional and invalid, and has asked you to request this department to render an opinion on the matter. The undersigned has conferred with Mr. Clithero personally, and with Mr. Robert W. Childs of Good, Childs, Bobb & Wescott, who also represent clients who are resisting the enforcement of this ordinance. Both Mr. Clithero and Mr. Childs have submitted to this department a written statement of their reasons for urging that the City Council is without power to pass the ordinance in question, and these communications have been carefully considered by the department before reaching the conclusions which are later stated in this communication.

Both counsel above referred to, who are opposing this ordinance, have cited and relied largely upon the decision in the case of *City of Savannah v. Robinson*, 81 App. 471, to sustain their contention that the ordinance in question is invalid, and both counsel urged upon this department, in connection with that decision, that the power to pass the ordinance in question is derived from Sub-sections 54 and 55 of Section I, Article 5 of the Cities and Villages Act. Sub-section 54 is as follows:

“To regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay and any article of merchandise.”

Sub-section 55 is as follows:

“To provide for the inspection and sealing of weights and measures.”

In the case of the *City of Savannah v. Robinson*, above mentioned, which would seem to sustain the contention of counsel opposed to this ordinance, the City of Savannah passed an ordinance creating the office of city weighmaster, and providing in effect, that all coal sold by the load or tonlot should be weighed by the city weighmaster, under certain conditions and regulations which are not dissimilar, so far as the question here involved is concerned, to the ordinance now before us. In that case it was urged by counsel representing the City, that the power of the municipality to pass the ordinance in question was derived from the above quoted 54th Sub-section, which gave the City power “to regulate the inspection, weighing and measuring of brick, lumber, firewood, coal, hay and any article of merchandise.” No other clause in the Cities and Villages Act was suggested by counsel for the City, none other was mentioned by counsel for appellee, and the decision of the Appellate Court was based entirely upon an interpretation of Sub-section 54 above quoted.

The 4th Syllabus in that case is as follows:

“Article 5, Section 1, Par. 54 of the General Incorporation Act, which gives Cities and Villages the power to regulate the inspection, weighing and measuring of

brick, lumber, firewood, coal, hay and any article of merchandise, does not by implication include the power to appoint a weighmaster, and compel persons desiring to sell coal to have the same weighed by, and receive certificates showing the same has been weighed, from such officers, before offering the same for sale."

The discussion by the court in this opinion is entirely concerning the definition of the word "regulate," the court expressing the opinion that the power to regulate was not the power to operate, that there was a distinct difference between regulation and operation, and under the power to regulate weighing, the City had not the power to license and to appoint a public weighmaster.

If Sub-section 54 were the only source of the power of the City to pass the ordinance in question it would have to be conceded that if the view of the Appellate Court for the Second District was to govern, that the City Council would be without power to pass the so-called weighmaster's ordinance. Technically speaking, the courts in the First District would not be bound by this decision, and there would be enough doubt in the minds of the City's law officers to induce them to make a test case to determine the validity of this ordinance.

A further examination of the enumerated powers in the Cities and Villages Act convinces us, however, that the power to pass this ordinance is not found solely or mainly in the 54th Sub-section above quoted, but as a matter of fact is found in the 91st Sub-section, which provides as follows:

"To tax, license and regulate auctioneers, distilleries, lumber yards, livery stables, *public scales*, ice cream parlors, coffee houses, detective agencies, private detectives, money changers and brokers."

This sub-section, it is evident from the opinion of the court in the *Savannah* case, was never even remotely suggested to the court or considered by it in rendering an opinion in that case. That opinion was simply and only a ruling of the court that the power to regulate the weighing of merchandise, did not carry with it the power to license or appoint a city weigh-

master, and to compel the weighing of such merchandise by such weighmaster. Section 4195 of the ordinance now before us, provides as follows:

"4195. *Appointment.*) Any person, firm or corporation owning a scale or scales suitable for weighing any commodity, produce or articles of merchandise in load lots, when contained in any wagon, auto truck or other vehicle, or in any quantity less than load lots when not contained in any wagon, truck or other vehicle, shall be eligible for appointment as a public weighmaster in the City of Chicago upon complying with the provisions of this article."

Section 4196 provides as follows:

"4196. Any person, firm or corporation desiring to be *licensed* as a public weighmaster, shall file an application in writing therefor, which shall conform to the general requirements of this ordinance *relating to applications for licenses*, and shall set forth the location of the place of business *for which such license is required*.
* * * Upon payment to the City Collector of the sum of twenty dollars as *an annual license fee*, the mayor may issue *the license* authorizing such applicant to act as a public weighmaster."

The whole effect and purport of this ordinance above quoted is *to license public weighmasters*, and the question before the department now to consider is whether or not the specifically enumerated power of the City to tax, license and regulate public scales includes the power to tax, license and regulate public weighmasters. It is evident from the plain reading of the section in question that the *Savannah* case does not in any way consider or pass upon this question. This is a question of the power of the City to regulate and *license public scales*. Is there any distinction between regulating and licensing public scales or regulating and licensing the persons who operate them? We think not. It is evident that the intention of the act is to give the City control by regulation and licensing of the weighing of commodities, whether the regulation be of public scales or persons who operate them.

In cases, arising from the interference of state laws with interstate commerce, the Supreme Court of the United States has several times held that it is the legislative intent and not the letter of the law that is to govern; and that so long as the interference existed it made no difference whether the regulations reached the conduct of business operations or the person who engaged in such business.

It is our opinion that there is no reasonable distinction between public scales and the persons who operate them, and that the City Council has clearly the power to pass the said public weighmaster's ordinance.

We think prosecution may well be instituted under that ordinance in the usual manner.

Yours very truly,

JOSEPH R. W. COOPER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

(Editor's Note: This opinion was sustained by the Illinois Supreme Court in the case of *City of Chicago v. Wisconsin Lime and Cement Co.*, 312 Ill. 520.)

**Removal of Street Refreshment Stands in Sixth Ward
by Council Order—Ordinance Cannot be
Repealed by Order.**

July 6, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Replying to your letter of the 3d instant, concerning the effect of the passage of the following order appearing on

page 292 of the Journal of the Council Proceedings of May 23, 1923:

“Ordered, That the Commissioner of Public Works and the Department of Police rescind all outstanding permits for use of sidewalk, parkway and street space by vendors of refreshments in the Sixth Ward and the streets bounding the same, and that no other such permits be issued therein without Council order.”

permit me to say that an order of the City Council cannot amend an ordinance and it is therefore of no effect and void.

The existence of the refreshment stand in question is by virtue of an ordinance, Par. 3735, appearing on page 1034 of General Ordinances of The Chicago Municipal Code of 1922:

“3735. *Unlawful to maintain stands, troughs, racks, platforms, etc.*) It shall be unlawful for any person, firm or corporation to erect, place or maintain in, upon or over any street, alley, sidewalk or other public place in the City of Chicago, any fruit stand, lunch stand, lunch wagon, flower stand, bulletin board, trough for feeding horses, or any table, box, bin, rack, showcase, platform, or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever, unless a permit for same shall be obtained from the commissioner of public works. * * *

The effect of the order would result in nullifying permits heretofore granted under the ordinance, and would result in the foreclosure of permittees in a certain locality of Chicago from exercising their rights.

In *The People v. Blocki*, 203 Ill. 372, wherein a switch-track was permitted by ordinance to be installed in a street, and later a Council order was passed directing its removal, the court said:

“* * *. The permits to lay switch tracks in said street were granted by the board of trustees of the Town of Lake in the years 1886 and 1889, respectively, and on the 10th day of June, 1901, the city council of the City of Chicago passed an order ‘that the commissioner of

public works be and he is hereby directed to remove the switch tracks of Jonathan Pettet and the Indiana Gravel and Sand Company laid in Wallace Street and the public alleys between Sixty-second and Sixty-third streets, as the same are a nuisance.' The City Council was powerless, by resolution, to repeal the ordinance of the Town of Lake granting the permits to lay switches in said street (*Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, 173 Ill. 91; *Chicago and Northern Pacific Railroad Co. v. City of Chicago*, 174 *id.* 439; *People v. Mount*, 186 *id.* 560); and as the commissioner of public works, by obeying the order, would have subjected himself to an action for damages, he was not obliged to obey the same and should not be commanded so to do by *mandamus*. *People v. Curyea*, 16 Ill. 547.

"The city council has no authority to declare and abate nuisances by a mere resolution, as was attempted in this case. The order of the city council of June 10, 1901, relied upon by petitioner, singled out the particular switch track described therein and ordered their removal, 'as the same are a nuisance.' This was class legislation and obnoxious to the constitution of the State of Illinois. 'Ordinances cannot favor or discriminate against any person or class of persons, but must be uniform and of general operation within the corporate limits.' (*Hibbard, Spencer, Bartlett & Co. v. City of Chicago*, *supra*, p. 98.) 'Municipal corporations are mere creatures of the legislative will, and can exercise no powers except such as the State has conferred upon them. * * * Their governmental and administrative powers (other than those conferred by statutory or constitutional enactments, which are self-executing), can only be exercised by appropriate ordinances. Such ordinances must be general in their character, and operate equally upon all persons within the municipality of the class to which the ordinance relates.' (*Zanone v. Mound City*, 103 Ill. 552, p. 556.) Admitting that the switch tracks might become nuisances, the common council, by virtue of the power delegated to it by the legislature, would only have the right to abate or suppress the same by a general ordinance which applies alike to all switch tracks similarly situated, otherwise the owner of other tracks laid and maintained under the same authority as those in question would enjoy a right or privilege denied to the owner of the particular switch tracks singled out for

removal. 'Each person subject to the laws has a right that he shall be governed by general, public rules. Laws and regulations entirely arbitrary in their character, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class. Distinctions in rights and privileges must be based upon some distinction or reason not applicable to others.' (*Harding v. People*, 160 Ill. 459, p. 465.)

It is, therefore, the opinion of this office that the order does not rescind the permit and until the City Council passes an ordinance amending the ordinance, the permit holders should be allowed the continued use of their allotted space.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of City To Require Construction Work On Railroad Viaduct to be Done At Night.

July 9, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

This office has received a communication from you requesting an opinion as to the power of the City to compel the Chicago & Northwestern Railroad Company to make repairs during the night time on a certain viaduct at West Grand avenue just west of the river, in order to avoid interference with street car traffic during the daytime. The right of the City to require that such work be done at night is primarily a question of whether or not such a regulation

would be a reasonable exercise of the police power, and we feel constrained to hold that such a regulation would indubitably be unreasonable, especially in view of the fact that you state in your communication that the railroad officials assert that they would be obliged to pay their employes double time for night work.

The City unquestionably has the power to regulate the use of streets. Article 5 of the Cities and Villages Act, Section 9, is as follows:

“The City Council in cities, and the President and Board of Trustees in villages, shall have the following powers: * * *

Ninth—To regulate the use of the same (the streets).

Tenth—To prevent and remove encroachments or obstructions upon the same.

* * * * *

Fourteenth—To regulate the use of sidewalks and all structures thereunder; and to require the owner or occupant of any premises to keep the sidewalks in front of, or along the same, free from snow and other obstruction.

* * * * *

Sixteenth—To provide for and regulate crosswalks, curbs and gutters.

Seventeenth—To regulate and prevent the use of streets, sidewalks, and public grounds for signs, sign posts, awnings, awning posts, telegraph poles, horse troughs, racks, posting hand bills and advertisements.

* * * * *

Twentieth—To regulate traffic and sales upon the streets, sidewalks and public places.

* * * * *

Twenty-fourth—To permit, regulate or prohibit the locating, constructing or laying a track of any horse or electric railroad in any street, alley or public place; but such permission shall not be for a longer time than for twenty years.

Twenty-fifth—To provide for and change the location, grade and crossing of any railroad.

* * * * *

Twenty-seventh—To require railroad companies to keep flagmen at railroad crossings of streets, and provide

protection against injury to persons and property in the use of such railroads. To compel such railroads to raise or lower their railroad tracks to conform to any grade which may, at any time, be established by said City, and where such tracks run lengthwise of any such street, alley or highway, to keep their railroad tracks on a level with the street surface and so that such tracks may be crossed at any place on such street, alley or highway. To compel and require railroad companies to make and keep open and to keep in repair ditches, drains, sewers and culverts along and under their railroad tracks so that filthy or stagnant pools of water cannot stand on their grounds or right-of-way, and so that the natural drainage of adjacent property shall not be impeded.

Twenty-eighth—To construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof."

Therefore while the City unquestionably has the right to inspect and require repairs to be made on defective viaducts and while the City unquestionably has the right to regulate the use of streets nevertheless these powers must be exercised reasonably. Freund "Police Power," Section 63, enunciates this principle in the following language:

"Section 63. It is a well established principle that municipal police ordinances, like all other municipal ordinances, must be reasonable in order to be lawful. The Supreme Court of the United States has declared it to be an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of the by-laws of inferior municipal bodies, the 'inferior municipal body' in the case cited being the Board of Supervisors of the County of San Francisco. It is possible to say that there is implied in every delegation of power to a municipal corporation a condition that the power must be exercised reasonably, and that therefore every unreasonable ordinance is *ultra vires*, and the court, in treating it as null and void, merely enforces the legislative will and principles of policy embodied in it."

In the case of *T. W. & W. R. Company v. City of Jacksonville*, 67 Ill. 37, the Supreme Court of Illinois held that an ordinance of the City which required a railroad company to keep a flagman by day and a red lantern by night at a

certain street crossing where the company had only a single track, and over which only its usual trains passed, and where it did not appear that such crossing was unusually dangerous or more so than ordinary crossings, was not a reasonable requirement and therefore was an invalid exercise of the police power.

In view of the foregoing principles of law, the Corporation Counsel is of the opinion that taking into consideration the fact that the Chicago & Northwestern Railroad Company would be obliged to pay double time to their employes and taking into consideration the fact that this closing of the street is merely temporary and not a permanent obstruction to traffic and commerce on the street such a regulation requiring all repair work to be done at night would be wholly unreasonable and arbitrary and a regulation which the City would have no power to make or enforce.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Construction of Phrase "Number of Persons Engaged" in Wearing Apparel Shop Ordinance.

July 10, 1923.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

In your letter of recent date you called attention to Section 2468 of The Chicago Municipal Code of 1922, relating to license fees for wearing apparel shops, and asked to be advised concerning the interpretation of the words "number of persons engaged in such wearing apparel shop."

The precise question you ask is whether you should construe these words to mean only the persons actually engaged in manufacturing, making, altering or repairing or whether there shall be included therein all persons otherwise engaged in the establishment, such as sales persons, clerks, office assistants, etc.

In our opinion, a proper construction of the words in question would be to limit them to the persons actually engaged in the manufacture, making, altering or repairing of the garments.

The reason for our conclusion on this point is that the licenses provided for under the chapter headed "Manufacturing Plants," seem to be intended as workshop licenses, and the provisions of the code in regard to the number of employes are different from provisions regarding the number of employes in other businesses. This distinction applies to all licenses in this chapter, viz., wearing apparel shops, factories and workshops, chemical or paint factories, and whole-sale vehicle shops.

By examining the license provisions included in the chapter on "Mercantile Establishments," it will be found that the number of employes includes all except drivers of vehicles and traveling salesmen. This, of course, includes office employes and others about whom you are inquiring. Likewise, in the case of the chapter on "Agencies and Agents," it is quite plain that office employes, salesmen, etc., are to be included in the number of employes when the license fees are computed. The same is true in the case of the chapter on "Automobile Storage and Repair," the chapter on "Unclassified Occupations," etc. Thus, in every instance where a license fee is graded according to the number of employes, except in the chapter under discussion, the provision as to who shall be included in the computation admits of no doubt. This in itself would seem to be conclusive.

In addition to what we have already stated, we call attention to the fact that the manufacturing plants included in this chapter are subject to the supervision and control of

the Department of Health with respect to ventilation, plumbing, inspection, seats for females and other sanitary requirements, all of which indicates that this is intended as a chapter licensing shops or workrooms as distinguished from the licensing of the business as a whole. This idea is, in fact, borne out by the statement of the representative of the Health Department who acts on the Revenue Commission, which originally fixed the license fee, his comment on the question you ask being that it was intended that only the operatives should be included in the computation.

For the reasons above given, we beg to advise you that in making the computation of the number of employes in wearing apparel shops, for the purpose of determining the license fees, office help, sales persons, etc., should not be included.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Enforcement by City Police of Injunction Obtained to Protect Private Interests.

July 11, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have requested the Corporation Counsel for an opinion in regard to the duty of police officers in connection with the writ of injunction obtained in the Superior Court of Cook County by C. B. Shane Co., a corporation, against the Amalgamated Clothing Workers of America. We desire to advise you that it is not the duty of the Police Department to enforce this injunction. If the injunction is violated the remedy is for the party who obtained the injunction to bring the violators into court, and to bring before the court the

facts which constitute the alleged violation in order that they may be punished for contempt of court. This rule is stated in High on Injunctions, 3d Ed., Section No. 1449, in the following language:

“And a person applying to a court of equity for the punishment of a party guilty of a breach of injunction must show that he has some interest in the subject-matter of the controversy which gave rise to the injunction.”

The same proposition has been reiterated by the Illinois courts in the case of *Diedrich v. The People*, 37 Ill. App. 604, at page 606, where the court said:

“‘An injunction obtained to protect a merely private right, is so far within the control of the party obtaining it, and is so far a matter of individual concern, that only those persons who have a present interest in the right to be protected, can be heard to complain of its violation.’ *Secor v. Singleton*, 35 Fed. 376. Much authority is there cited in support of that proposition, and therewith accords *Crook v. The People*, 16 Ill. 534.”

This said injunction is issued primarily for the protection of private rights, in that it enjoins the Amalgamated Clothing Workers of America from interfering with the business of C. B. Shane Co. by soliciting its employes to quit work or by threatening or intimidating its employes or interfering with them in any way. Therefore, a violation of this injunction should be complained of by the said C. B. Shane Co. It is not the duty of the police to make arrests for any alleged violations of this injunction, unless the same should in fact constitute a breach of the peace or disorderly conduct of any kind for which an arrest would ordinarily be made. Should any breach of the peace occur, the police officer should at once arrest the offenders as on any other occasion.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Contract to Purchase Globe Holders—Necessity of Signature of City Comptroller—Retention of Benefits Under Invalid Contract.

July 12, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Your recent letter concerning the liability of the City for globe holders alleged to have been purchased without authority was referred to the undersigned for consideration and reply.

It appears from your letter and attached memorandum that in the inventory sheets of the Department of Gas and Electricity appears an item reading, "15,318 No. 79 Tungsten straight globe holders at \$1.50 each, \$22,977.00," and that said department is carrying these in stock under what is termed "bond issue account."

We called on the Department of Gas and Electricity for a more detailed statement of facts, and in response to our request a memorandum, copies of letters, and some original documents, were turned over to us. We also made inquiry of Mr. Patterson, of the Comptroller's office, concerning whom Mr. Cenfield made mention in his memorandum, in order to ascertain the reason for the refusal of the Comptroller to sign the contract for globe holders last fall.

As a result of this investigation, we find that the facts are as follows:

The City Council on June 29, 1922, made an appropriation from the Street Lighting Bond Fund (Council Journal, pp. 707-8. For the purposes of this opinion we will assume that this appropriation by implication authorized the Com-

missioner of Gas and Electricity to enter into a contract for globe holders.

The commissioner advertised for bids on 15,000 globe holders under date of October 6, 1922. Specifications were submitted to six different concerns, but only one bid was received. This bid was from the Chicago Pressed Steel Company, under date of October 25, 1922, the price being \$2 each.

The commissioner undertook to enter into a contract with this company. He prepared a form of contract under date of November 1, 1922, turned it over to the company for signature, and received it back on November 8th signed by the company's officials. It was then turned over to the Corporation Counsel for approval as to form, and it was so approved.

The contract was then forwarded to the Comptroller, to be approved and countersigned by him and approved by the Mayor. The approval of the Comptroller on a contract is not an empty formality, but it is necessary in order to make the contract binding on the part of the City. Under Section 27 of The Chicago Municipal Code of 1922 the Comptroller is given supervision over contracts and over all purchases, and by Section 50 it is provided that all contracts exceeding \$500 "before becoming of any effect shall be approved and countersigned by the comptroller." The bidder was bound to take notice of these ordinances. Similar ordinances appeared in the Code of 1911.

It appears that the Comptroller was not satisfied that the price was correct. Under the sections of the code already mentioned, also Section 45, and other sections, it was his duty to make further inquiry before approving the contract. He secured a test bid on 300 of the globe holders in question and ascertained that he could purchase them for 59c apiece. He thereupon informed the commissioner by telephone or otherwise that he would not sign the contract.

On November 24, 1922, the Chicago Pressed Steel Company was notified by the commissioner to hold up the manu-

facture of the globe holders. This company replied that the process of manufacture was so far along that it could not be suspended, and late in November or early in December, 15,318 of the globe holders were delivered to the storeroom at 405 West Chicago avenue.

It appears further that there is no record in the Department of Gas and Electricity of any order, either verbal or written, having been given for these globe holders. They were therefore included in the inventory as stated, and we are told there was a special note added to the effect that no contract or order number was available.

There seems to be no good reason for listing the globe holders at \$1.50, and so far as we have learned, there has been no bill at that price presented.

Later on (February 9, 1923) a letter was addressed to the Finance Committee by the Commissioner of Gas and Electricity requesting authority to purchase 15,815 of these globe holders at \$10.80 per dozen, or 90 cents apiece. A form of council order was presented with the letter which, if passed, would authorize such contract with the Chicago Pressed Steel Company, without advertising, and the order states that they are to be "patented globe holders, similar to the City's standard globe holder of which there are 17,363 now in use." The question of the right of the City to use these globe holders without paying a royalty thereon having been raised, an opinion was obtained from the Corporation Counsel, and as a result the proposed order was not recommended for passage, and there was no council action taken thereon.

The question now arises as to what the obligation or liability of the City is in case claim is made for payment for the goods in its possession, and what shall be done to protect the City's interests and to prevent the assertion of such claim.

We have given the full details of this transaction, in order to show that the contract was never entered into, in spite of the fact that it will be claimed that the commissioner

was given the right to make the contract, had a lawful appropriation, and proceeded regularly in securing bids. These are matters which, while we do not concede them as having occurred in the precise way that they probably will be asserted, would be hard to overcome if there was any act or thing done which would place either the Mayor, Comptroller or City Council in the position of having assented to or ratified the action of the commissioner.

In the absence of anything that can be construed as a ratification, the only thing further that is necessary for a complete defense is the return of the goods. It was held in *McGovern v. City of Chicago*, 281 Ill. 264, that where a contract is irregularly entered into by the officers of the City, if the contractor performs and the City avails itself of the fruits thereof the City is liable. It might be contended that the retention of these globe holders amounts to an acceptance of the benefits of the contract, thereby leaving a situation which would require but slight proof in order to establish the right to recovery. To avoid this we recommend a tender of the goods to the Chicago Pressed Steel Company.

A tender by notice that the goods are at the place mentioned and at the disposal of the company and will be delivered to its agent on demand may be sufficient. But we would regard a delivery to the company at its office or factory, or any other place it may designate upon notice, a better method of handling this situation under the peculiar conditions of the case.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Duty of City of Chicago to Furnish Water to City of West Hammond.

July 12, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of July 6, 1923, to which were attached correspondence, including a report of the City Engineer, regarding the application of the City of West Hammond for the execution of a contract with the City of Chicago for the purchase of water from the said City of Chicago. You ask us to advise you whether the City of Chicago is obliged to furnish water to the City of West Hammond. For the purpose of this opinion we are assuming that the City of West Hammond is a duly incorporated city, included within the Sanitary District, and its inhabitants have borne taxation for the purpose of supplying the water works system of the City of Chicago with pure water. Also that the said City of West Hammond builds or causes to be built suitable and sufficient water mains to the limits of the City of Chicago.

At page 404, Session Laws of 1917 will be found the following:

“An Act to amend Section 26 of an Act entitled, ‘An Act to create sanitary districts and to remove obstructions in the Desplaines and Illinois rivers,’ approved May 29, 1889, in force July 1, 1889.

“Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That Section 26 of an Act entitled, ‘An Act to create sanitary districts and to remove obstructions in the Desplaines and Illinois rivers,’ approved May 29, 1889, in force July 1, 1889, be and the same is hereby amended to read as follows:

“Sec. 26. Whenever in any such sanitary district there shall be a city, incorporated town or village, which

owns a system of water-works and supplies water from a lake or other source which will be saved and preserved from sewage pollution, by the construction of the main channel, drain, ditch or outlet herein provided for, and the turning of the sewage of such city and district therein, and there shall be in such sanitary district any territory bordering on any such city, incorporated town or village, within the limits of another city, incorporated town or village, which does not own any system of water-works, at the time of the creation of such sanitary district then upon application by the corporate authorities of such latter named city, incorporated town or village, the corporate authorities of such city, incorporated town or village, having such system of water-works shall furnish water at the boundary line between such municipalities by means of its water-works to the corporate authorities asking for the same in such quantities as may be required to supply consumers within said territory, at no greater price or charge than it charges and collects of consumers within its limits for water furnished through meters in like large quantities.

“Provided, however, that where any such latter named city, incorporated town or village has no territory bordering upon such city, incorporated town or village so owning a system of water-works and supplying water as aforesaid, such latter named city, incorporated town or village may receive water in the same manner and under the same conditions as though it had territory bordering upon such municipality owning a system of water-works and supplying water as aforesaid: provided such latter named city, incorporated town or village builds or causes to be built suitable and sufficient water mains to the limits of such city, incorporated town or village so owning a system of water-works and supplying water as aforesaid to connect with the water mains and receive the water from such city, incorporated town or village so owning a system of water-works and supplying water as aforesaid.”

Our Supreme Court in the case of *The City of Chicago v. The Town of Cicero*, 210 Ill. 290, very fully covers the subject-matter of your inquiry, and construes and interprets Section 26. We attach a copy of the opinion in that case hereto for your guidance.

Under the above statute and the decision of the Supreme Court it is, in our opinion, obligatory on the part of the City of Chicago to furnish water to the City of West Hammond.

Very truly yours,

THOS. W. FLYNN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Duty of City Police to Enforce Law on Streets Under Control of Park District.

July 13, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter of July 6, 1923, requesting information as to whether the enforcement of laws on West 123d street from the west line of State street to the east line of Halsted street is to be turned over to the park commissioners under an ordinance "giving consent to the West Pullman Park Commission to take, regulate, improve, control and govern" said street, has been referred to me.

Section 15 of an act in regard to the completion of public parks and the management thereof, in force July 1, 1871, provides as follows:

"The commissioners of any such park may appoint and support a police force." (Cahill's Revised Statutes, 1921, Chapter 105, Par. 21.)

Section 20 of the same act provides in part as follows:

"If the commissioners of any such park shall think it proper to use any public street or road, or part thereof,

for such driveway or part thereof, it shall be lawful to take and use such street, or part thereof, in the discretion of the commissioners, provided * * * and also the consent of the City Council in case the street is within a city * * * when any driveway has been extended as aforesaid or when the commissioner shall determine to use any street or road, or part thereof, and the consent of the authorities having control thereof shall be given, as aforesaid, the driveway so extended, or the street or part thereof so taken, as aforesaid, shall form a part of said park, and may be improved, managed and governed as a part thereof." (Cahill's Revised Statutes of 1921, Chapter 105, Par. 26.)

Section 3 of an act to enable park commissioners or corporate authorities to take, regulate, control and improve public streets leading to public parks; pay for the improvement thereof, and in that behalf to make and collect a special assessment or special tax on contiguous property, approved and in force April 9, 1879, provides as follows:

"Such park boards shall have the same power and control over the parts of streets taken under this act, as are or may be by law vested in them of, and concerning the parks, boulevards or driveways under their control. (Chapter 105, Para. 206.)

Section 5 of the same act is as follows:

"Any city, town or village in this state, shall have full power and authority to invest any of such park boards with the right to control, improve and maintain any of the streets of such city, town or village. for the purpose of carrying out the provisions of this act."

Section 1 of an act to enable park commissioners or park authorities to take, regulate, control, improve, repair and maintain public streets, etc., in force July 1, 1917, being Paragraph 244 of Chapter 105 of Cahill's Revised Statutes of Illinois for 1921, provides that every board of park commissioners shall have the power to connect any public park, boulevard or driveway under its control with any part of any incorporated city, town or village, the territory of which shall touch, bound or be contiguous to such public park,

boulevard or driveway, by selecting and taking any connecting street or streets or part thereof leading to such park, boulevard or driveway, and shall have the power to accept and add to any park or parks under their control, any street, in its entirety or parts thereof which adjoins or runs parallel with any boundary line of the same by securing the consent of the corporate authorities.

Paragraph 247 of the same act is as follows:

“The said board of park commissioners or public authorities shall have, in addition to the power conferred, the same power and control of the street or streets, or part or parts thereof, including the regulation of traffic thereon, taken by them as aforesaid as is now or may be by law vested in them; provided, that the power and control conferred on the board of park commissioners or park authorities by this act shall not be in limitation or construed to be in limitation of the power of the corporate authorities in the city, town or village to enforce the ordinances thereof, within the limits of the street or streets, or parts thereof, taken as aforesaid.”

It is apparent from the foregoing that park commissioners have the power to take over the control of streets in the City of Chicago, and that the City has the power to grant them that right. It is apparent also, from Paragraph 247, that it was intended by the Legislature to reserve to the City the right to enforce its own ordinances, and makes the power of the City in that regard concurrent with the right of the park commission to control and govern the said streets.

I am, therefore, of the opinion that both the City police department and the park police department of West Pullman have the right and duty to enforce the law on the streets in question.

Very truly yours,

FRANK M. PADDEN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Authority of City Comptroller to Reduce Bond of A City Depositary.

July 13, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

Answering your letter concerning the request of the Italian Trust & Savings Bank to substitute a surety bond issued by the Independent Indemnity Company, amount \$25,000, for the bond you now have on file of \$50,000 issued by the Southern Surety Company, it is our opinion that there is no way in which a depositary can reduce its bid for City funds or the bond which was provided and under which the bank was accepted as a depositary.

Section 29 of the Chicago Municipal Code of 1922 provides:

"No money shall be deposited in any bank, nor any award be effective until such bank has been designated as a depositary and shall have first delivered to the comptroller an indemnifying bond running to the City of Chicago, to be approved by the City Council, in an amount equal to the amount which the City Council shall determine such bank or depositary shall be entitled to receive upon its bid."

Therefore, before any bank can receive funds from the City it must deliver its bond in an amount equal to the amount that the City Council has prescribed in the ordinance naming it as a depositary.

Although there is provision for the substitution of other bonds in lieu of the bond or bonds first submitted, and while the ordinance provides for increasing the deposit and necessarily increasing the bond when that is done, however, the ordinance does not provide for any reduction of a bond or the reduction of the deposit, because the only purpose that would be served by that would be the reduction of the premium that the depositary has to pay. It is entirely within the discretion of city officials to reduce the amount of the de-

posit without a reduction of the bid or without a reduction of the bond.

It is our opinion that the handling of the City's funds must be in strict accordance with the law, otherwise City officials would render themselves liable. Since there is no provision in the law for reducing the penalty in the bond and no provision for changing the ordinance at this time so as to reduce the amount the City Council has determined the Italian Trust & Savings Bank is entitled to, the change suggested would not be legal.

There is nothing in the law which would prohibit you from accepting a new bond for \$25,000 from an acceptable surety company. The original bond of the surety company could not be surrendered without the City Council taking action. The City officers are not authorized to reduce City bonds without express Council authority.

Your bond and correspondence are herewith returned.

Very truly yours,

LEONARD J. GROSSMAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of Retirement Board of the Policemen's Annuity and Benefit Fund to Reinstate Pensioner
Whose Disability Has Been Removed.**

July 17, 1923.

HON. NICHOLAS R. FINN, President, Civil Service Commission.

Dear Sir:

Your letter of July 6th with reference to a communication of June 21st addressed to you by the Policemen's Annuity and Benefit Fund, concerning Captain P. D. O'Brien of the Police Department, has been referred to this office for attention.

In this communication, the secretary of the Retirement Board of the Policemen's Annuity and Benefit Fund suggested that the records of said Retirement Board have been changed to read "disability pension" and that on the finding of Dr. Henry J. Way the disability had been removed. The Retirement Board has ordered the reinstatement of Captain O'Brien to active duty in the rank held by him before his retirement.

Under the law the function of the Retirement Board of the Policemen's Annuity and Benefit Fund and the function of the Civil Service Commission are entirely separate and distinct. The Retirement Board is without jurisdiction to enter any order which would be binding upon the Civil Service Commission, so far as appointing, removing or reinstating any member of the classified civil service is concerned.

I understand that the records show that Captain O'Brien resigned from the service December 21, 1915, and under these circumstances, under the law, Captain O'Brien, at that time ceased to be a member of the classified Civil Service. There is no order that has been entered or that could be entered by the Retirement Board of the Policemen's Annuity and Benefit Fund which would have the effect of reinstating him in his former position.

Very truly yours,

FRANCIS X. BUSCH,

Corporation Counsel.

Necessity of Promotional Examination for Position of Chief Clerk.

July 17, 1923.

MR. WILLIAM F. FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

Replying to your letter of the 12th instant, given in answer to mine of the 5th instant, concerning examination held

by the Civil Service Commission on November 19, 1921, for chief clerk, in which you state that the records indicate that an original entrance examination was held in this position and that at no time was there a promotional examination called:

Section 9 of the Civil Service Law expressly provides that wherever practicable, positions are to be filled by a promotional examination, and the Supreme Court in the *Errant* case (229 Ill.) have construed the word "practicable" as used in the Civil Service Act as being synonymous with "possible." If there was more than one applicant in the grade below that of chief clerk, which I understand was Branch 1, Class A, Grade 6, such persons were entitled to take a promotional examination for the higher position. I am, therefore, of the opinion that the original entrance examination held in this case was illegal and so advise you.

Under the circumstances, the proper procedure would be to recall all certificates made as the result of this original entrance examination and expunge and cancel all of the records of the Civil Service Commission in regard thereto, and, as soon as possible, call a promotional examination for this position.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Tenancy When City Holds Over After Lease Has Expired.

July 18, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your request of June 8, 1923, concerning the premises on the north side of 22d street between Hoyne ave-

nue and Robey street occupied for playground purposes under lease from James W. S. Peters to the City of Chicago, the rental consideration of which was the paying of the general taxes on the property. You have also attached a copy of the last executed lease which expired on November 30 1919, and you say that you have no written renewal. You also state that the City is still occupying the property and is taking care of the taxes as provided in the last executed lease. You desire to know the legal status of the City's occupancy of this property at this time and also what our position would be in the event that the City desired to cease using same.

From the copy attached and from your letter, we see that the last lease which expired on November 30, 1919, was for one year. Since the City has elected to hold over and the lessor has not objected to the City's holding over and has accepted in lieu of rent the City's payment of taxes for the year involved, that constitutes a hold-over lease and the legal status at this time is to make the lease one from year to year.

In the event that the City desire to cease using the premises it can do so at any time. The City, however, must pay the taxes for the year that it has occupied the premises as provided in the lease. It also would be necessary, in case the City desired to cease using the premises or terminate this lease, to give the lessor sixty days' notice, in writing, of its intention to terminate its tenancy at the end of the year. The notice may be given at any time within four months preceding the last sixty days of the year, or the 30th day of November.

Yours very truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Payments Made to Beneficiaries of Persons
Under the Workmen's Compensation Act Are
Entitled to Full Amounts of Pensions.**

July 18, 1923.

D. F. CAMPBELL, Actuary, Municipal Employees' Annuity
and Benefit Fund.

Dear Sir:

We have your letter of July 10th, in relation to the cases of Edna Irish Brown, widow of George G. Brown, P. R. 3467-5, Master Mechanic, who died July 8, 1922, and Mary Curtis Smith, widow of Frank A. Smith, P. R. 3467-6, Construction Laborer, who died June 17, 1922, and asking an opinion as to whether money received by these persons under the Workmen's Compensation Act shall be deducted from benefits to be paid to them.

This precise question is covered by Section 5 of Chapter 48 of the Revised Statutes of Illinois, which is the act usually referred to as the Workmen's Compensation Act, and said Section 5 is in part as follows:

“The term ‘employee’ as used in this Act, shall be construed to mean:

“*First*—Every person in the service of the State, county, city, town, township, incorporated village or school district, body politic or municipal corporations therein. * * * *Provided*, that such employee, his personal representative, beneficiaries or heirs, who is, are or shall be entitled to receive a pension or benefit for or on account of disability or death arising out of or in the course of his employment from a pension or benefit fund to which the State or any county, town, township, incorporated village, school district, body politic or municipal corporation therein is a contributor, in whole or in part, shall be entitled to receive only such part of such pension or benefit as is in excess of the amount of compensation recovered and received by such employee, his personal representative, beneficiaries or heirs under this Act.

* * *

It will be noted that under this section no deduction from a pension or benefit fund is authorized except where the disability or death arises out of or in the course of employment, and this being true, the ordinary annuity payments to a widow would not be affected, but it would be necessary to make deductions from any annuity which a widow is entitled to by reason of the death of her husband in the course of his employment.

In the act establishing the present annuity fund it is provided that in case of the death of an employe as a result of injury incurred in the performance of duty, certain payments shall be made to his widow in excess of her ordinary benefits which are to be known as "compensation annuity" and "supplemental annuity," and it is these two special "annuities" that are effected by Section 5 of the Compensation Act quoted above.

It will, therefore, be necessary in the cases of Mrs. Brown and Mrs. Smith to reduce the "compensation annuity" and "supplemental annuity" until the deductions equal the amount of compensation received under the Workmen's Compensation Act.

Very truly yours,

FRANK M. PADDEN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Whether Time of Illegal Discharge Shall be Computed Determining Pension Rights.

July 18, 1923.

D. F. CAMPBELL, Actuary, Municipal Employees' Annuity
and Benefit Fund.

Dear Sir:

We are in receipt of your letter of July 11th, inquiring whether municipal employes who were discharged from the

service and afterwards reinstated to their former positions by court order are entitled to have the time during which they were not on the City payroll counted in their favor in computing their years of service.

Where, in a proper proceeding, the courts determine that an employe has been illegally discharged and he is then restored, he is entitled to have the time during which he was illegally kept out of the service counted the same as though he were on the payroll all that time. An illegal discharge is no discharge.

Very truly yours,

FRANK M. PADDEN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City for Damage Done by Act of Police Officer.

July 18, 1923.

HON. ROSS A. WOODHULL, Chairman of Finance Committee.

Dear Sir:

Referring to attached correspondence relative to claim of MacLean Drug Company in the sum of \$211 on account of the breaking of the corner windows of their drug store at 1000 Wilson avenue, by reason of a wheel coming off of an automobile in charge of Patrolman (Chauffeur) Thomas Hayes, which is referred to this department for an opinion as to whether or not the City of Chicago is liable for the damage in question. You are advised as follows:

In the case of *City of Chicago v. George H. Williams*, 182 Ill., page 137, the court said:

“Police officers are not agents or servants of the city, appointing them, within the rule making the corporation answerable for their acts, nor is a municipal corporation liable for the nonfeasance or misfeasance of the officers of its police. There is an implied or common law liability for the negligence of municipal officers in the performance of corporate acts, which have relation to the management of the corporate or private concerns of the municipality, from which it derives special or immediate profit or advantage as a corporation. But where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the law for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred. * * * In *Wilcox v. City of Chicago*, 107 Ill. 334, where suit was brought to recover damages for an injury, sustained through the alleged neglect of a driver of a hook and ladder wagon, belonging to the city fire department, while such driver was engaged in the service of the city in saving property from destruction by fire, it was held that the members of the fire department, although appointed by the city corporation, are not servants and agents of the city for whose conduct the city is liable, but that they act rather as officers of the city charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, unless it is expressly given, and that the maxim *respondeat superior* has no application to such a case.”

In the case of *Perry v. City of Oregon*, 139 Ill. App., page 607, the court said: “Where acts are done by the officers of towns and cities in their public capacity in the discharge of duties imposed by the laws for the public benefit and for the promotion and preservation of the public welfare, no private action lies unless the right to bring it is expressly conferred.”

In the case of *Nicastro v. City of Chicago*, 175 Ill. App. 634, it is said: “The act of the fireman in taking plaintiff into the fire house and up to the second floor thereof and leaving him unguarded was merely his personal act not authorized by the city, and for the consequences of that act the city cannot be held liable. The doctrine of *respondeat superior* does not apply to the case.”

In the case of *Henry Jennings, Appellant v. County of Peoria, Appellee*, 196 Ill., page 197, it is said: “It was well established at an early day that in this State a

private action will not lie against a county for injuries occasioned by the negligence of its servants or officers in the performance or nonperformance of their duty, or in the performance of their duty in a negligent manner, unless expressly so provided by statute. * * * The Constitution of 1870 made a county a municipal corporation, and some of the cases above cited were decided since that Constitution took effect. The same principle applies to a municipal corporation when it is performing those acts which it is empowered to do in its public capacity, and in the discharge of duties imposed for the general welfare, such as the exercise of the police power, and the like."

In the case of *Tollefson v. City of Ottawa*, 228 Ill., page 136, it is said: "A city is not liable for the negligent acts of its agents or servants engaged in executing, enforcing or giving effect to its police ordinances and regulations. *Dillon on Mun. Corp.* (3d Ed.), Sec. 974."

In the case of *Evans v. City of Kankakee*, 231 Ill., page 227, it is said: "The law is well settled that the police regulations of a city are not made or enforced in the interest of the city in its private capacity but in the interests of the public, and that a city is not liable for the acts of its officers in attempting to enforce police regulations."

In the case of *Johnston v. City of Chicago*, 258 Ill., page 498, it is said: "A purely charitable corporation is by the weight of authority held not liable for the torts or neglect of its servants in the performance of their duties in carrying on the work of such corporation. Neither is a city liable for the acts of its employees who are acting under the police power granted to such corporation. (2 *Cooley on Torts*,—3d Ed.—1011."

The car in question was being driven by a member of the Police Department and the occupants of the car, at the time of the accident, were engaged in official police business and, therefore, you are advised that it is the opinion of this office that the City of Chicago is not liable for the damage above set forth.

Respectfully submitted,

FRED V. MAGUIRE,

Approved: Assistant Corporation Counsel.

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure Under Civil Service Rules in Laying Off Employees on Account of Lack of Work.

July 19, 1923.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

I beg to acknowledge receipt of yours of the 17th instant. You have asked my opinion as to the proper procedure in the matter of four General Paving Inspectors in your Department whose services are not required. •

Under the Civil Service Law, you have no right, as the Head of your Department, to demote any employe; nor have you the right to abolish any position in the classified Civil Service which has been regularly created. There is no provision in the Civil Service Law authorizing the demotion of a member of the classified Civil Service, and the City Council or the State Legislature alone has authority to create or abolish positions or offices.

If, through lack of work or lack of funds, you do not require the services of these General Paving Inspectors, you should notify the Civil Service Commission that you have laid off employes for either one of these reasons. If your report of lay-off is accepted by the Civil Service Commission, such employe should be placed upon the Civil Service reinstatement list and would be eligible for re-certification as soon as a vacancy occurs or as soon as there is work in your Department for him to do.

The rules of the Civil Service Commission require that where it is necessary to lay off a member of the classified Civil Service, either because of a lack of work or lack of funds, such lay-offs should be in the order of the relative seniority of the employe in that particular class or grade;

in other words, the employe with the lowest seniority is laid off first.

If you will take this matter up with Mr. William F. Foehringer, Secretary of the Civil Service Commission, and show him this letter, I am sure he will be able to work out the details with you, so that whatever action you take will be within the Civil Service Law as above outlined.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

**Authority of City to Purchase Land Outside Limits for
Use as a Dump—Whether Consent is Necessary
of Trustees of Township in Which
Land is Located.**

July 20, 1923.

COL. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of July 16, 1923, to which is attached a communication from Mr. Wm. R. Tucker, submitting an offer for the sale to the City of Chicago, of a quarry hole located within the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Section 34, T. 39, R. 13, Township of Cicero.

You also request to be advised, first, whether the City can legally acquire by purchase, this property located outside of the corporate limits of Chicago for the purpose of dumping. Secondly, you desire to know if the consent of the Board of Trustees of Cicero is required to permit the City of Chicago to dump ashes, rubbish, etc.

In answer to the first part, whether the City can legally acquire by purchase, property located outside of the corporate

limits of the City of Chicago, let us say that the authorities are somewhat conflicting but we are of the opinion that the City may, without special grant, purchase and hold extra-territorial lands for purposes of a dump.

As to the second part, whether the consent of the Board of Trustees of the Township of Cicero is required to permit anyone to dump ashes, rubbish, etc., we quote from the Municipal Code, Town of Cicero, adopted April 9, 1917, Section 1081, which is as follows:

“No person or corporation shall pile or deposit, or cause to be piled or deposited any manure, offal, garbage, or any accumulation of any offensive or nauseous substance anywhere within the Town except at such place as may be authorized by the Board of Trustees in and by a written permit issued for such purpose.
* * *

We have had a conversation with Mr. Edward J. Carmody, Attorney for the Town of Cicero, who informs us that this particular dump hole has been used since 1908 or 1909, as a general dumping place for everybody. He also informs us that he can see no objection to the City of Chicago using this for dumping ashes, rubbish, etc., particularly so, if garbage, refuse, offal, manure, street sweepings, or any other substance that may contain disease germs or any other substance that may be decomposed or become filthy, noxious, unhealthful, or a nuisance in general, will not be dumped. He also gave us the impression that the Board of Trustees of the Town of Cicero would likely welcome the filling in of this hole under ordinary sanitary regulations.

Yours truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Validity of Contract Before Executed by City—Effect
of Acceptance of Benefits by City—Acceptance
of Bid, Alone, Does Not Make Contract.**

July 20, 1923.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

In response to your verbal request for an opinion as to whether the Safety Insulated Wire and Cable Company can hold the City liable for its failure to execute a contract for fifty thousand (50,000) feet of lead covered electric light cable, part of which has been delivered to your department, we beg leave to state that the submission of forms of contract by the City to the party of the first part does not of itself warrant the expectancy that the City was ready to execute the contract nor to surmise that such execution might be regarded as mere formality.

It is assumed that when the City offered copies of its contract in triplicate for signature and seal of the Safety Insulated Wire and Cable Company that the officers of said company read the covenants therein, one of which, appearing on lines 116 and 117 thereof, states the following:

“This agreement shall not be in force and effect or in any way binding upon the City of Chicago until the same has been countersigned by its Comptroller and approved by its Mayor.”

The contract in question which I have before me neither bears your signature nor is it countersigned by the City Comptroller or approved by the Mayor.

In the case of *B. & O. S. W. Ry. Co. v. People*, 195 Ill. 423, the court said:

“Where the parties make the reduction of the agreement to writing and its signature by them, a condition precedent to its completion, it will not be a contract

until that is done. And this is true although all the terms of the contract have been agreed upon."

We direct your attention to Section 50 of The Chicago Municipal Code of 1922, which reads:

"Contracts exceeding Five Hundred Dollars—by whom let) All contracts for work, material, or supplies of any kind or nature, let by any officer of the City, where the amount of such contracts exceeds five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same. All such contracts *before becoming of any effect* shall be approved and countersigned by the comptroller."

It is therefore an unexecuted contract which is no contract at all and the parties thereto revert to their only status, that of dealing with bids.

In advertising for material and supplies, the ad which attracted the bid of the Safety Insulated Wire and Cable Company carried the following paragraph:

"The Commissioner of Gas and Electricity reserves the right to reject any or all bids as may be deemed by him to be for the best interests of the City of Chicago."

The company so offering its product made its bid subject to this important reservation and in becoming the lowest responsible bidder this did not *ipso facto* resolve the bid into a contract.

We read in Dillon on Municipal Corporations (5th Ed.), Section 810:

"After the opening of the bids, the ascertainment of the lowest and most favorable bidder, and the adoption of a resolution that the contract be awarded to him *does not make a completed contract* between the municipality and the bidder when the charter requires that all contracts relating to City affairs shall be in writing, or when the advertisement so specifies, or when some further step remains to be taken, and some discretion is still left in the officers of the municipality to ascertain the responsibility of the bidder, or to satisfy themselves of the expediency and desirability of contracting with him."

The mere fact that a party who has made proposals for a contract for public work is the lowest bidder and knows that fact it does not constitute or avail to him such contract.

Aside from the above, you were devoid of any power at all to contract for these goods or any goods by reason of the omission of such vested authority in The Municipal Code of 1922. In order for this contract to be legally accepted by the City if it so wished, it would be necessary in view of this serious omission of contractual ability on your part, that a special ordinance be passed by the City Council authorizing the contract.

If perchance your department made use of some of the cable delivered, we are of the opinion that the rule of *quantum valebat* (as much as it was worth) should apply, and payment made to the Safety Insulated Wire and Cable Company for goods so used. This is in line with decisions and references, below:

"City Council of Montgomery v. Montgomery Water Works, 79 Ala. 233. In *Argenti v. City of San Francisco*, 16 Cal. 255, Chief Justice Field said: 'The doctrine of implied municipal liability applies in cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtained the money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligations to do justice which binds all persons whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or, if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject, but the law which always intends justice implies one.' "

On the question of estoppel, which point may be raised, in Abbott on Municipal Corporation, Vol. 1, Section 279, it

is said: "The general rule obtains, however, that a public corporation cannot be estopped by the unauthorized acts of its officers or agents."

City of Galesburg v. Galesburg Water Co., 34 Fed. 675.

Rissing v. City of Ft. Wayne, 137 Ind. 427.

City of St. Louis v. Gorman, 29 Mo. 593.

Huron Water Works Co. v. City of Huron, 7 S. D. 9.

For the reason that you did not execute the contract, and even if executed it would have had no legal status, we are of the opinion that you are bound to reject the same and re-advertise for bids under the ordinances now permitting you to contract passed on July 2, 1923.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Use of Funds From Bond Issue for Acquiring Buildings "For the Police Department" for the Reconstruction of the John Worthy School and Juvenile Retention Home.

July 20, 1923.

HON. CHARLES SCRIBNER EATON, Chairman, Sub-Committee of Committee on Finance, Police and Municipal Institutions, and Efficiency, Economy and Rehabilitation.

Dear Sir:

Your letter of June 11, 1923, submits to us a plan for remodeling and reconstructing portions of the John Worthy

Dormitory and School and the Juvenile Detention Home and School, at a cost of approximately \$140,000, and you ask whether this can be financed by means of the bonds remaining in the Police Department Building Bond Fund.

The bonds in question were authorized by an ordinance passed on March 1, 1915. (See Council Journal, p. 3763.) They were issued "for the purpose of acquiring the necessary sites and constructing buildings and remodeling existing buildings for the Police Department." The purpose thus stated is broad enough to include any building which may be contemplated that comes legitimately within the sphere of the activities of the Police Department.

The John Worthy Dormitory and School are located on ground owned by the City. The Board of Education built the school, and its consent would have to be obtained if the buildings were to be used for anything except school purposes. We have no doubt, however, but that a way can be found for taking over this building if the Board of Education determines that it is no longer necessary or useful for school purposes.

The only other question involved concerning this dormitory and school is whether the new use to which it will be put comes sufficiently within the province of the police department so that when so used it can be regarded as a police department building.

The House of Correction is a separate agency entirely distinct from the Police Department. We are told that the use contemplated is that of a jail or at best a city-owned house of correction rented to and operated by the county. Your letter states that the management and supervision of the inmates and of the building and equipment, together with the support and upkeep of the inmates, will be entirely under the direction of the sheriff.

Under these conditions it can hardly be said that the reconstructed building will be a building "for the Police Department," and unless there is something done to make it

more properly within the control of the Police Department we do not think it would be proper to finance its rebuilding out of the Police Department Bond Fund.

With respect to the Juvenile Detention Home and School, it appears that the City owns the site, the County owns the building, and the Board of Education owns the school. There will be no difficulty so far as the County is concerned, because the proposed use will be such that it may be regarded at least partly as a County use. As to the Board of Education, the same situation presents itself as in the case of the John Worthy School which is only such an obstacle as we have already stated and can be overcome.

It would seem from what you say that this building, when remodeled, will be used for the detention of female prisoners now held in police stations, and in addition thereto a part of the building is to be made available for the use of the County under the jurisdiction of the sheriff.

It is our opinion that if the major portion of the building is used as you indicate, i. e., for female prisoners now held in police stations, the bond fund is available. This is true even if you should call the building a Women's Detention Home, or some other name that has no resemblance to "Police Station," since it would be a building "for the Police Department."

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Authority of City to Make Sewer Connection for Land
Beyond City Limits—Validity of Order Direct-
ing Commissioners of Public Works
to Make Such Connection.**

July 23, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In response to your request for an opinion as to the validity of an order directing you to issue a permit to Walter G. McIntosh to connect a sewer to an existing outlet at Bryn Mawr and Newark avenues, we submit the following:

On its face the order in question, which appears on page 776 of the Journal of the Proceedings of the City Council of July 2, 1923, does not indicate that the subdivision known as Norwood Heights is beyond the City Limits. From a position which has been presented, and from the copy of your letter to the Mayor which is before us, we learn however that this is a subdivision of about 45 acres and that it is not in the City.

We learn also from the sources mentioned that, as laid out, the subdivision contains more than a mile of streets; that the Chicago sewer into which it is proposed to drain it is only twelve inches in diameter and barely sufficient to drain the property fronting along Newark avenue which it was designed for; that if a ten or twelve inch sewer were to be connected with it the flooding of basements along the street would result; that a sewer of sufficient capacity to drain an area of 45 acres should have a diameter of 30 to 36 inches; that a ten or twelve inch pipe would be inadequate and would result in flooding the area and the City would be confronted with a serious drainage problem if the subdivision were to be annexed; and that this land is so situated that the owners of the larger part of the section in which it is located

will probably also demand drain connections so that the balance of the 640 acres can be drained.

It is further stated that there is a movement on foot to annex the lands lying west of Nagle avenue and south of Bryn Mawr avenue, and that if this is done it will admit of a comprehensive plan of drainage that will serve the whole area without harm to the present City sewers.

From all the information at hand it appears that the action intended by the City Council was not only a matter of great importance, but was also tantamount to making a contract concerning extra-territorial activities, a legislative matter which could only be done by virtue of powers expressly conferred. Such contract as is here proposed can only be made in pursuance of an ordinance, and a mere order on which the record does not even show that there was a roll call is not sufficient.

According to Dillon (Mun. Corp., 5th Ed., Sec. 776), the general doctrine that a municipal corporation cannot usually exercise its powers beyond its corporate limits is relaxed where express or implied power is given, and that in a case where express authority to provide drainage is given without restriction, such power may be exercised to find an outlet for sewage beyond its limits. All the cases which we have been able to discover that bear out this doctrine are ones where the municipality is seeking an outlet for its sewage and surface waters and not where a person on the outside wants to use the municipality's sewers. Hence, there is some doubt in our minds whether such a thing as is proposed here, where City property would be used by the owner of land outside of the limits without compensation, is lawful. But for the purposes of this discussion we will assume that the rule works both ways, and that with proper legislative action such a contract may be made. The question then arises as to what is proper legislative action.

The authority to do what is here proposed, assuming that it exists, is based on Clause 29, Sec. 1, Art. V, of the Cities and Villages Act, giving the City Council power "to

construct and keep in repair culverts, drains, sewers and cesspools and to regulate the use thereof." As to the manner of exercising this power, we quote again from Dillon, as follows:

"In *Illinois*, the rule seems to have been adopted that legislative acts must be by ordinance only, and the court seems to found this rule on two features, viz.: (1) the power to enact ordinances and (2) charter powers conferred upon the common council. Thus, in *Chicago & N. P. R. Co. v. Chicago*, 174 Ill. 439, 446, where these elements concurred, *Magruder, J.*, said: 'Acts of the city which have for their object the carrying into effect of charter powers thus granted (by enumeration of the powers which the city council may exercise) are legislative in their character, and it is well settled that acts of municipal corporations which are legislative in their character must be put in the form of ordinances and not of mere resolutions.'

Dillon on Munc. Corp., 5th Ed., Sec. 572-n.

The author cites Illinois authorities in support of his text, some of which bear directly on the subject in hand. Thus, it was held, in *Village of Altamont v. B. & O. S. W. Ry. Co.*, 184 Ill. 47, that by Clause 96 (now 100) of the section conferring powers it is provided that cities and villages may pass ordinances to carry the powers into effect, and that this contemplates the passage of an ordinance whenever legislative action is to be taken which establishes "a permanent rule of conduct or government" or which is to have "a continuing force and effect."

Another quotation directly in point is as follows:

"It has been said that acts of the City which have for their object the carrying into effect of the charter power granted to the city are legislative in their character, and it is well settled that acts of municipal corporations which are legislative in their character must be put in the form of an ordinance and not of a mere resolution."

Village of London Mills v. White, 208 Ill. 289.

Such acts as voting the necessary authority to construct drains, to establish grades, etc., have always been held to

be legislative acts of such a character as to require ordinances, and mere orders or resolutions will not bind the City.

Claffin v. City of Chicago, 178 Ill. 549.

Paterson v. Barnet, 46 N. J. L. 62.

Creighton v. Munson, 27 Cal. 613.

McManus v. Hornaday, 99 Iowa, 507.

In the case of the order in question, if the direction to the Commissioner of Public Works were a mere executive order it would be valid. But what it amounts to is authority to make a contract with a party concerning territory beyond the limits of the City. It is doubtful whether the issuance and acceptance of the permit without any provision for compensation would amount to a contract, but if not, that fact also, in addition to the fact that there was not the proper form of corporate action, would render the order invalid.

Aside from all we have said above, under the conditions that you describe, you would be justified in hesitating about enforcing even a valid provision if the order had been such. The law is absolutely clear that if, by carrying into effect a provision of this kind, damage is done through overflow, the City would be liable.

City of Ottumwa v. Nicholson, 143 N. W. 439. (See case note in Neg. and Comp. Cases, Annotated, Vol. 6, p. 123.)

Dillon on Mun. Corp., 5th Ed., Secs. 1742-1746.

We are therefore constrained to advise you that the City Council's order is not valid, and that you are not bound to observe it.

Yours truly,

LEON HORNSTEIN,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Authority of City to Establish and Maintain a Municipal Ice Plant.

July 23, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

On June 29, 1923, you requested an opinion from this department regarding the power of the City of Chicago to engage in the business of manufacturing and selling ice.

The same question has arisen several times in the past and this department, on April 7, 1913, and on June 9, 1914, submitted opinions thereon to the City Clerk and the City Council, respectively, which opinions now appear in the printed volume of Opinions of the Corporation Counsel covering the period from January 1, 1913, to October 5, 1914.

The conclusion reached in both of the opinions mentioned above was that without additional legislative authority, the City of Chicago has no power to engage in the business of manufacturing and selling ice except in necessary connection with the operation of some other municipal occupation. We have, up to the present time, no reason for changing our opinion on the subject. Without going into detail on the matter contained in these opinions, we shall here briefly go over the ground covered by them.

The City has no powers except those delegated to it by the State. Among those powers, whether enumerated in Section 1 of Article V of the Cities and Villages Act, or in other acts granting powers to the City, there is no power, express or implied, to maintain a municipal ice plant.

However, were the operation of an ice plant a necessary incident to the exercise of an express power possessed by the City, such operation would be proper. In this connection if the occasion should arise for establishing such a plant, it would be entirely proper for the City to anticipate its rea-

sonable future needs and install a plant having a greater manufacturing capacity than that required at the present time. Were this a *bona fide* attempt to provide for future needs, the City would have authority to dispose of its surplus products to its inhabitants. (See Dillon on Mun. Corps., 5th Ed., Sec. 997, pp. 1594-1596.) That is the extent of the City's powers under present laws.

In 1917 a bill, designed to delegate to the City of Chicago the power to maintain and operate municipal ice plants, was passed by the General Assembly but was vetoed by the Governor, and no further efforts have been made in that direction. Although the question has never been passed upon in this State, the Supreme Court of Georgia, in the case of *Holton v. Camilla*, 134 Ga. 560, held that legislation authorizing the City of Camilla to manufacture and sell ice was entirely proper and not contrary to the Constitution. Legislation to this effect has also been enacted in Connecticut, Minnesota and Wisconsin.

Therefore, in our opinion, the City of Chicago, at the present time, has no power to establish and maintain a municipal ice plant.

Very truly yours,

RUTH C. NELSON,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Necessity of Compliance with Mandamus Order When
Impossible for the Comptroller to Comply—
Effect of Appeal as Supersedeas.**

July 24, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether you should honor the payroll presented

by the Bailiff of the Municipal Court containing the names of additional deputy bailiffs not provided for by appropriation, and how you can do so if it is your duty to honor it.

Accompanying your letter is a copy of the order of the Superior Court granting a writ of mandamus against the City, the Mayor, the City Council and the Finance Committee, commanding them to make an additional appropriation.

Without discussing the question of whether you are such an agent of the City that you would be bound to honor the order without being specifically named, we call your attention to the fact that the order calls for the passage of an appropriation. This does not come within the province of executive officers, is not included among your duties, and you are therefore not to be expected to do something which you have no power to do.

In addition to this, we beg to advise you that we prayed an appeal to the Supreme Court from the final order of the court directing the mandamus to issue, and such appeal was granted. This appeal is now pending and operates as a stay to all proceedings under or by virtue of said order.

You are therefore not required by law to do anything at present in furtherance of said order.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

(Editor's Note: See *People ex rel. Egan v. City of Chicago*, 310 Ill. 534.)

**Transfer of Funds in Appropriation Ordinance by
Order Instead of Ordinance—Power of Council
to Transfer Funds From One Department to Another.**

July 24, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of the 18th inst., calling attention to the two orders transferring funds, passed by the City Council on July 2, 1923, and appearing on pages 700 and 764, respectively, of the Council Journal, you ask two questions.

Your first question is whether such transfer requires an ordinance or whether it can lawfully be made by order. In this connection you state that it was your impression that the Appropriation Bill cannot be amended by order.

It has been the practice of making the transfers of funds within the department authorized by Section 2a of Article VII of the Cities and Villages Act by order instead of by ordinance since the said section was adopted in 1915.

The Law Department has always recommended that the form of an ordinance be used for that purpose. The question has come up several times, although we do not find that there was any written opinion on the subject at any time.

The transfer of funds does not amount to an amendment of the Annual Appropriation Ordinance. That can only be amended at the next regular meeting held not less than five days after its passage. If such transfer were in the form of an amendment to the Appropriation Bill it would be invalid.

We have objected from time to time in the past to transfers being made by order, and have advised the Finance Committee that we did not favor that form. But we have not treated such orders as invalid, because, while the form of the

corporate action was bad, there was always a record of a ye and nay vote and approval by the Mayor. Under such circumstances the courts, looking to the substance instead of the form, would probably have construed such orders as having the effect of ordinances.

We are, however, very much in favor of the form of these transfers being changed from orders to ordinances, so that the point that there is a conflict between the intent of the Council in the Appropriation Bill and the intent of the Council in making the transfer cannot be raised. If it should be held at any time by the courts that there is such a conflict, then the rule that the substance and not the form of the corporate action must control, will give way to the familiar rule that you speak of, viz., that an ordinance can only be amended or repealed by a legislative act of equal dignity.

Your other question relates to the transfer of sums from salary accounts to other accounts, and you ask whether these are not invalid under Section 4 of the Appropriation Bill.

The part of Section 4 which is involved in your question reads as follows:

“That the Comptroller and the heads of other departments, bureaus and offices * * * are hereby prohibited * * * from changing any salary or wage item herein, and from incurring any liability which will necessitate the transfer from the appropriations for salaries and wages in their respective departments.”

The section in question must, of course, be read in connection with the remainder of the ordinance. There are a number of provisions in the preliminary sections which apply to the heads of departments and in some cases, as in this, limit their authority. These do not appear to be intended as a check on the City Council itself. Hence, it would be unlawful for the head of a department to change an item or to incur a debt which would make such a transfer necessary, but it would be entirely within the powers conferred by statute for the City Council to take sums that were not used from

the "Salaries and Wages" accounts and transfer them to other accounts.

Again, the obvious intention of the provision above quoted is to prevent the head of the department from depriving any employe of any part of the salary appropriated for the position and also to prevent the paying of higher wages than the appropriation warrants to any employe in the department. The use, for other purposes than at first intended, of money that is not necessary or is saved in a salary and wage account, does not conflict with this obvious intention. Therefore, while it might be improper for the head of the department, even under this theory, to resolve for himself what shall be done with money left over in this way, it is clearly within the province of the City Council to control it.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Employment with Contractor Doing City Work May be Computed in Determining Pension Rights.

July 24, 1923.

MR. DONALD F. CAMPBELL, Actuary, Municipal Employees
Annuity and Benefit Fund.

Dear Sir:

We have your letter of July 18th asking whether employes now working on bridges for the City and who were formerly employed by contractors on the same work should have the time of their services with such contractors counted as service for the City under the benefit fund.

It is our opinion that you can not credit service of these employes except for the time when they were hired and paid directly by the City.

Yours very truly,

FRANK M. PADDEN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Propriety of Using Three-inch City License Plates for
Vehicles When Ordinance Calls for "Ap-
proximately Four-inch Plates."**

July 25, 1923.

HON. AL. F. GORMAN, City Clerk.

Dear Sir:

We have your letter in which you ask us to advise you as to the size of the vehicle license plate which it is the duty of the City Clerk to furnish under Section 4072 of The Chicago Municipal Code of 1922.

The section of the code referred to requires you to furnish "a metal plate circular in form and approximately four inches in diameter." The provision has been in force since November 2, 1921. (See Council Journal, p. 1149.) Nevertheless plates have been made only three inches in diameter heretofore. This gives rise to the question of whether the word "approximately" admits of an interpretation that allows so much variation.

There is a well understood legal significance to such words as "approximately," "more or less," etc., when used in legislative acts, contracts, deeds and other written documents. Briefly, it means that such slight variation from the exact figure or figures as may be found necessary or convenient is permissible; but it would not be possible to stretch the

meaning so that "three" could be substituted for "four." Hence, if you desire to conform to the strict letter of the ordinance the plates would have to be four inches in diameter.

There seems to be objection to the use of the larger sized plates required under the terms of the code. Attention is called to the fact that under a similar ordinance three inch plates have been used for two years without protest, that the smaller plates interfere less with the mechanical operation of the cars, that they are of sufficient size for the police to see them readily, that they fit into plate holders to better advantage than the larger plates, and that it would save the City at least \$15,000 to use the smaller plates. By reason of all these advantages it would seem desirable to continue the use of the three inch plates. This, however, is purely an administrative and not a legal question. If you think it would be of sufficient advantage to the City and to the users of vehicles to continue to use the present size of plate, there is no good reason why you should not do so. The only way to prevent you from doing it is by court action, and probably no one will undertake to compel you to make the plates the larger size.

Should you come to the conclusion to use the three inch plates, we recommend that an amendment be prepared and submitted to the City Council changing the word "four" to "three." There is ample time to pass this before the new plates will be required, and in the meanwhile the order can be given for the smaller plates on the assumption that the City Council will undoubtedly acquiesce in your judgment in this regard.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Pension Rights of a Municipal Employee Employed as a "Temporary Employee."

July 25, 1923.

MR. WM. D. CASSIDY,
Clerk, Municipal Employees' Annuity and Benefit Fund,
1005 City Hall.

Dear Sir:

We have your letter of July 12th, asking our opinion as to whether Anton Skustad, an employee of the Department of Health, who was a "temporary employee" during the latter part of the year 1921, and who failed to make payments of \$2.50 each month into the treasury of the fund, can now make those payments so as to be considered a "present employee" under the Act of 1921.

Under the Act of 1911, "temporary employees" defined as 60 day employees, were not included within its provisions. In the Act of 1921, Section 12, a "present employee" is defined as "any municipal employee who shall be in the employ of the City as a municipal employee thereof, on the 31st day in the month of December in the year in which this act shall come into force and effect in such city." The definition, however, of a "municipal employee" as defined in the same section specifically excludes from the benefit of the act any present employee in the service of such City by virtue of "temporary employment" as defined in Section 10 of the Civil Service Act.

I am therefore of the opinion that Mr. Skustad is not a "present employee" under the Act of 1921, and that he could not qualify as such by making payments into the fund to cover the periods you mention.

Yours very truly,

FRANK M. PADDEN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Pension of Pensioner Who Has Been On Retired Roll and Reinstated to Active Duty and Again Retired Should be Computed According to Salary at Time of First or Last Retirement.

July 25, 1923.

HON. AL. F. GORMAN, City Clerk.

Dear Sir:

We have your letter of July 17th, relative to the application of Geo. S. Gahagen, who was retired and pensioned on May 29, 1918, and who on August 20, 1922, was restored to active service and now desires to go on the pension roll at the rate of \$83.33 per month, being one-half of the present salary of firemen.

Under the Act of 1917, any fireman after having served 20 years of which the last 5 years shall be continuous, may retire from active service. In defining what is continuous service, Section 8 provides that "Firemen subject to be called for duty whether in active service or on leave of absence shall be regarded as being in the fire service."

Under this provision, a fireman who is retired on a pension is no longer in the service and could get no credit for any service during the time which he was retired.

When a fireman who is once retired is restored to active duty, he is, so far as the provisions of the pension act are concerned, in the same situation as a new member of the department, and when he again retires, he must accept his old pension unless his second period of service was long enough to entitle him to a pension under the said second period.

I am of the opinion that if Mr. Gahagen is placed on the pension roll, it will have to be at the old rate of \$62.50 per month.

Yours very truly,

FRANK M. PADDEN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Power and Authority of City to Require Surface Lines
to Raise Trolley Wires When Same are so Close
to Lamp Posts as to be Dangerous.**

July 25, 1923.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

Your letter of recent date concerning hazardous conditions that exist on West 26th street between Rockwell street and Kedzie avenue, was referred to the undersigned for consideration and reply.

It appears from the data accompanying your letter that the City has 17 Chicago base posts in the street in question; that the masts on these are 21 feet 6 inches high; that above that on each pole extends an ornamental top which brings the height up to 23 feet; that the street railway company operating cars there has feeder cables on 30-foot poles set 6 feet in the ground, so that the feeders are only 24 feet from the ground; that the clearance is only one foot over the lamp posts at best; that in most cases the City lamp posts are in the center of the span where the slack of the feeder is greatest, so that there is only a few inches of clearance and in some cases none at all or the City lamp posts extend above the feeders.

You state these conditions are highly dangerous and should be remedied by placing five feet risers on the street

railway company's poles, thus raising their feeder cables. You state further that the City's posts were set by the Sanitary District after the feeder cables had been installed, and by reason of that fact you are in doubt whether you have the power to compel the street railway company to make this change at its own expense; and you ask our opinion on this point.

We have examined the ordinance granting the street railway company the right to operate, on the theory that whether the ordinance is now in force or not it would indicate whether there was an express reservation on this point.

There are a number of provisions in this ordinance which indicate that it was the intention to leave the City entirely unhampered in its use of the streets. Thus, Section 5 permits the City to use the poles of the company, Section 14 requires the company to keep the part of the street occupied by it in repair, the schedule marked "Exhibit A," which is a part of the ordinance, requires certain feeder wires to be placed underground and reserves the right to compel the placing of the remainder underground under certain conditions, and there are other specifications relating to conduits, maintenance of streets, pavement, sprinkling, removal of snow, etc., which bear out this idea.

In addition to the general features of the ordinance already mentioned, there are two conditions imposed which are more specific. One is contained in the exhibit referred to and reads as follows:

"All wires and conductors for the transmission of electricity in and along any street, alley or public way (whether under or above ground) shall be installed in a substantial and workmanlike manner, so as to interfere as little as possible with the other uses of said public places; and all electric work of every kind and character shall comply strictly with the ordinances of the City applicable thereto."

The other specific condition is the express reservation of the police power by the City, contained in Section 37. The first paragraph is particularly significant in this connection; it reads as follows:

“Nothing in this ordinance contained shall be construed as depriving the said City of the right of exercising any police power which it would have possessed or enjoyed had this ordinance not been granted.”

In addition to what may be gathered from the terms of the ordinance, the law generally applicable to such a case is that the City retains control of the use and improvement of its streets in every reasonable manner, and the rights of the street car company are subordinate to the power and authority of the municipality in this respect.

Snouffer v. C. R. & M. C. R. Co., 118 Iowa, 287.

Detroit v. Ft. Wayne & E. R. Co., 90 Mich. 646.

On a number of occasions questions have arisen as to whether or not the street car company can be put to expense for reconstruction or alteration merely because another utility corporation needs the changes in order to conform to its ordinances or its duty to the public. We refer to such cases as where the street car tracks were to be lowered in order to provide sufficient clearance in a steam railway subway, and to cases similar to that. As to these the Law Department has usually recommended settlement by contract; but such cases bear no resemblance to the situation you describe, where the City is merely providing in a reasonable way for one of its most important functions—street lighting—and the equipment of the street railway company interferes so greatly with this function as to create a dangerous condition.

We believe that the street railway company should be notified to place risers on its poles and given a reasonable time, to be specified in the notice, within which to do this work or otherwise to make the conditions safe; and in case it fails to do the work the City should do it and demand compensation for the expense of same.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Authority of Board of Local Improvements to Have
Extra Pavement Paid for Out of Funds in the
"Special Assessment Fund—Interest on
Deposits and Investments."**

July 27, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have before us a letter from you calling your attention to the order of the City Council (Council Journal, June 27, 1923, pp. 591, 592) directing you to accept the propositions of the contractors, respectively, who are paving East 71st street and East 83d street under local improvement ordinances, for the construction of additional paving alongside of that provided for under the local improvement proceedings. You ask whether contracts drawn pursuant to the Council order would be valid, and, if so, that such contracts be drawn by this department.

The communication forwarded to the City Council by the President of the Board of Local Improvements which accompanied the draft of the order afterwards passed by the City Council contained, among other things, substantially the following statement of facts:

The Clyde avenue system ordinance (Warrant 48945) provides for a 28-foot roadway in East 83d street from Yates avenue to South Chicago avenue. The owners of the frontage desire a 44-foot roadway. The contractor has offered to do this additional work for \$10,079.30, which is based on the contract rate and is less than it could be done for if an independent contract were let. The East 71st street system ordinance (Warrant 48873) provides for a 24-foot roadway in East 71st street on each side of the Illinois Central tracks from Yates avenue to Stony Island avenue. The owners of

this frontage want a 28-foot roadway on each side of the tracks. The contractor has offered to do this additional work for \$22,500, which is also an advantageous price. The attorney for the Board of Local Improvements advises that the additional payments cannot be made out of the special assessments now levied, but that the desires of the property owners may be met if the City enters into a separate contract for the paving of the additional widths and pays the cost thereof out of other funds without expense to the property owners.

The letter of the President of the Board then suggests that there is available for these purposes the money in the fund known as "Special Assessment Fund—interest on deposits and investments," and recommends that an order directing the Commissioner of Public Works to accept the offers of the two contractors and to co-operate with the Board in the superintendence and inspection of the work be passed, the work to be paid for out of the fund mentioned, to the end that these wider roadways may be built and inspected in each of these two cases as one improvement. The order so submitted is the one mentioned above. Just why this particular fund is selected as available is not quite clear to us, unless it is assumed that it would be more just and equitable to taxpayers generally to have this expense borne by the fund accumulated as interest from special assessments.

We understand that the possibility of objection on the part of property owners because the improvement as completed will not be exactly as prescribed by ordinance has already been suggested to the attorney representing the contractors, and that he is satisfied that the danger on this point is so remote as to be negligible. We will therefore pass over this legal technicality as of no consequence.

The only obstacle we find to the proposed plan is that it would not be lawful to use the money in the fund that has been selected for this purpose.

The City has the right to use money from the general corporate fund for purposes of street paving. It may also

use the vehicle tax fund for such purposes. But the particular fund referred to is created under a statute which specifies how the money may be used, and such use as is here contemplated is not provided for. In fact, we do not even find an appropriation from this fund which could be drawn on for a purpose strictly within the purview of the law creating it, and the order in question does not purport to be an appropriation.

The following is the language of the statute involved:

“Section 2. Interest accruing upon deposits of money derived from special assessments may by ordinance of the city council of such city or board of trustees of such town or village be used in retiring outstanding special assessment vouchers and bonds that may be delinquent by reason of any deficiency in the fund out of which such vouchers or bonds are to be paid or for paying interest or deficiency in interest or for paying assessments on account of public benefit or for the purpose of purchasing any lot, block, tract, or parcel of land or any real estate at any sale had to enforce the collection of special assessments or special taxes.”

Hurd Rev. St., 1921, Ch. 24, Sec. 758.

In view of the difficulty which we point out, we are constrained to advise you that it would be better to wait until the City Council has found an available appropriation to draw on, than to prepare the contracts which you ask us to draft in case of no legal objection on our part.

We will forward a copy of this opinion to the President of the Board of Local Improvements, so that he may take such action as he deems proper under the circumstances.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Lease for Restaurant Concession on the Municipal Pier.

July 30, 1923.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

Recently you requested of me an opinion as to the validity of the lease to Mr. George B. Levee for concessions on the Municipal Pier, and to investigate into the reasonableness of the prices charged by the said George B. Levee and his sub-concessionaires.

1. As to the Legality of the Lease.

For your information and possible reference to it, should you care to make it, a copy of the lease between the City of Chicago and George B. Levee is hereto attached.

The statute permitting the City to use a portion of the Municipal Pier for recreation purposes and to contract for the lease of such portions is found in Chapter 24, Cities and Villages Act, Pars. 615 and 616, Smith's Illinois Revised Statutes for 1921, which said sections are as follows:

"615. May use utility for recreation purposes.) Section 17a. Every such city and village shall also have the right, power and authority and such right, power and authority are hereby granted to use for public recreation purposes any portion of any such utility which is not immediately needed for transportation uses or which can be used for such recreation purposes without interfering with the use of such utility for transportation purposes in the judgment of the corporate authorities of such city or village. (Added by act approved May 18, 1917.)"

"616. May contract for lease of portions or concessions.) Section 17b. In connection with the use of any portion of such utility for recreation purposes, as specified in the previous section hereof, every such city and village shall also have the right, power and authority and such right, power and authority are hereby granted

to provide, by lease or contract, for the sale in or on such utility of food, non-alcoholic drinks and merchandise and for the giving in or on such utility of dances, concerts, exhibitions and other entertainments and for check-room privileges incidental thereto: *Provided*, however, that each such lease or contract shall be terminable by such city or village, either with or without compensation therefor as may have been therein stipulated, upon reasonable notice, whenever in the judgment of the corporate authorities of such city or village the transportation necessities shall make such termination desirable: And provided, furthermore, that no such lease or contract shall be entered into for a period exceeding, five (5) years except in conformity with the provisions of Section 11 of this act. (Added by act approved May 18, 1917.)''

On March 31, 1923, page 2203 of the Council Proceedings of said date, appears the following order:

ORDERED: "That the Commissioner of Public Works and the Chairman of the Harbor Board be, and he is hereby authorized to award the contract for catering and concessions on the Municipal Pier for the years 1923, 1924, 1925, 1926 and 1927 to Geo. B. Levee, in accordance with his proposal hereto attached, to pay to the City of Chicago, the amount of 28½ per cent of the gross receipts from said concessions."

In pursuance of the foregoing Council order, the contract between the City of Chicago and Geo. B. Levee, as attached to this opinion, was entered into. An examination of the Council order, and the contract passed in pursuance thereof shows that there is in all respects a compliance with the Enabling Act. The contract runs for a period less than five (5) years. The Enabling Act provides that whenever in the judgment of the corporate authorities, the transportation necessities of a public utility shall make it desirable to terminate the contract for recreation purposes, such contract may be terminated upon the giving of reasonable notice. However, this does not mean that the corporate authorities may arbitrarily exercise their judgment. In the instant case, it is obvious that transportation necessities have not made

the termination of this contract desirable in that the recreation end of the Municipal Pier is not adapted for, and could not be used for transportation purposes, and in that all of the docking facilities on the Municipal Pier are not in use.

It is provided in the body of the contract that the selling of all foods, beverages, tobacco, confections, etc., and the prices charged therefor shall be satisfactory to and subject to the approval of the Commissioner of Public Works. This provision, of course, must be construed to mean "subject to the reasonable approval of the Commissioner of Public Works."

I therefore conclude that the lease to George B. Levee is a valid lease.

The lease also contains a provision against the sub-letting of the concessions granted in said lease until written application has been made for such permission to the Commissioner of Public Works, and the written consent of said Commissioner first obtained. I am not advised as to whether these consents have been obtained, but have directed that an investigation be made of this phase of the matter, and will report the result of it to you in a supplemental communication.

2. As to the Reasonableness of the Prices Charged :

The question of whether or not the Commissioner of Public Works can reasonably disapprove of the present prices charged on the Municipal Pier is a question of fact, namely, whether upon investigation the present prices charged on the pier are exorbitant or unreasonable.

Upon information obtained from Alfred E. Dehnert, 2649 Aubert avenue, one of the sub-concessionaires on the pier, who operates a photography stand, most of the concessions on the pier are operated by sub-concessionaires; only a few small concessions such as a cigar stand being operated directly by Geo. B. Levee. Information is that the said Geo. B. Levee, at the stand operated directly by him, charges 15c for a 10c cigar and 20c for a 15c package of cigarettes. The contract between Alfred E. Dehnert and Geo. B. Levee re-

quires, in substance, that Mr. Dehnert pay Mr. Levee \$10 per week in advance and 35 per cent of his gross sales, and that he pay his own bills for water, gas and electricity.

The contract with the sub-concessionaire who runs the cotton candy stand is similar except that 50 per cent of his gross sales are paid to Geo. B. Levee. The contract with the restaurant sub-concessionaire, Janes & Co., is that \$10 per week and 50 per cent of the gross sales are paid to said Geo. B. Levee. The contract to the Modern Beverage Company also is similar. Mr. Dehnert states that these terms are so severe that in his particular case, he is unable to make sufficient profits from his concession to support himself, his net profits for the preceding month being in the neighborhood of \$150.

While undoubtedly 50 per cent of gross sales is an exorbitant price for a concessionaire to require, it should also be borne in mind that the concessionaire, Geo. B. Levee, is required to turn over to the City of Chicago, 28 $\frac{1}{4}$ per cent of these receipts.

In this connection, I direct your Honor's attention to a letter sent you by Honorable A. A. Sprague, Commissioner of Public Works, under date of July 25, 1923. For your convenience, I am attaching hereto a copy of Commissioner Sprague's letter.

If there is a condition here which needs to be corrected, the remedy which obviously suggests itself, is that the middleman, the present concessionaire, should be eliminated, and that the contracts for all concessions should be made directly with the City of Chicago, upon the recommendation of the Commissioner of Public Works. Details of accounting and management could be taken care of by the Superintendent of the Municipal Pier. In this way the prices could then be lowered to an amount corresponding to the profit now realized by Mr. Levee from his lease. However, since under the circumstances it would appear that Mr. Levee's lease is valid and that nothing has occurred to warrant a forfeiture thereof by the City, my suggestion would be that Mr. Levee

be approached to enter into a new agreement with the City by which the percentage of 28½ per cent of the gross receipts now paid to the City could be reduced and the prices charged by Mr. Levee and his sub-concessionaires be supervised and approved by the Commissioner of Public Works, so that the particular commodities sold are offered to the public at the lowest possible prices.

Because of the provision in the contract that the selling of all foods, beverages, etc., and the prices charged therefor must be satisfactory to and subject to the approval of the Commissioner of Public Works, I am of the opinion that there should be very little trouble in inducing Mr. Levee to fix a fair price for all of the commodities which are offered for sale on the pier.

Respectfully submitted,

FRANCIS X. BUSCH,

Corporation Counsel.

Municipal Court Rule that Person Arrested for Certain Motor Vehicle Offenses Shall be Required to Give \$400 Bond or \$100 Cash Bond.

Chicago, July 31, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You referred to us an order of The Municipal Court of Chicago concerning bail of owners and operators of automobiles, with a request for advice as to your rights in complying with this order.

The order in question provides for the amendment of Rule 32 of the Rules of The Municipal Court in such manner that hereafter a bond of \$400 with surety or a cash bond of \$100 will be required of certain offenders who are taken into custody. The persons subject to this provision are owners or drivers of automobiles who violate the speed laws, who

drive while intoxicated, who pass street cars while discharging or taking on passengers, who pass street cars on the left side, or who drive recklessly.

The practice heretofore has been to give a person who has offended in this way a slip containing a notice to appear in court at a certain time. In this way such offenders have escaped arrest on view, although subject to arrest under the strict letter of the law.

While the jurisdiction of the Municipal Court does not attach until the law violator is brought into court or a complaint is filed, it is entirely within the power of that court to establish a rule with respect to bail of persons arrested on view which applies to all parties brought in. Even as the rule stands after amendment it is a modification of the harsh procedure which the law authorizes.

In cases of violation of the State Law there is no other course provided by law for bringing in offenders except arrest, but minor offenders will still be treated as before. In the case of violation of City ordinances, there is provision in the law for the service of summons as in the case of the ordinary civil procedure. Nevertheless, the law permits an officer even in those cases to make arrest of the offender where the officer sees the offense committed. Hence, the order can be observed by you in all cases of arrest on view included within its terms without danger of personal liability, the party arrested having recourse only in case of false arrest or malicious prosecution the same as in all other criminal cases.

We therefore beg to advise you that you will be entirely within your rights if you follow the procedure indicated by the order of court.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Advancement of Money in City Treasury for Payment of Final Judgments of Condemnation.

August 1, 1923.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

You have asked for an opinion as to the validity of the statutes and ordinances governing the advancement of money out of funds in the City Treasury for the payment of final judgments of condemnation in local improvements involving the taking or damaging of private property.

The City has followed the practice of using money in the treasury in this way since the passage of the amendment of 1917 to the Act Concerning Municipal Funds, such amendment having been drafted by the City's Law Department and presented to the General Assembly for this express purpose.

So far as the validity of the statute is concerned, the procedure amounts to the same in law as in the case of the purchase of tax anticipation warrants from the same funds. In the latter case the City's idle funds are used to pay the current year's expenses, and the funds are reimbursed from the general taxes already levied, to be collected the following year. In the case of such advancement for a local improvement the funds may be used to pay for condemned property such amount as is fixed in the final judgment, and the funds are reimbursed from the special assessment already levied, to be collected within five years. The principle is the same in both cases.

The purchase of tax anticipation warrants from time to time as money is needed is placed by general ordinance under the joint control of the comptroller and treasurer. (See Section 56 of The Chicago Municipal Code of 1922.)

There is no general ordinance which controls the procedure in the case of advancements for purposes of condem-

nation. Hence, it was necessary to pass the two ordinances of July 2, 1923, about which you inquire. (Council Journal, pp. 688-690.) As in the case of the general ordinance, these also place the control of the matter jointly in the hands of the comptroller and treasurer.

The ordinance in the Code and the two ordinances recently passed are in strict conformity with the statute, except perhaps with respect to the "fund set aside for use for some particular purpose." Some years ago it was customary to name the particular funds on which the City would draw, but it was found more convenient and equitable to draw on the aggregate of funds, the only difference being that in the one case the funds are named while in the other they are all included without naming.

There has been no test in the courts of the validity of these provisions. The statute containing them was first enacted in 1911 at the instigation of the Law Department of this City. It was designed to permit such purchase of tax anticipation warrants at first, but was amended from time to time until its scope is now much wider. All these amendments emanated from the same source. Consequently, it is plain that this department has been committed to the validity of this law for twelve years.

Numerous opinions were rendered from time to time by this office to the effect that it was proper to invest trust funds of the City. (See Opinions, March 11, 1912, p. 713; May 26, 1913, p. 270; October 19, 1914, p. 26; June 6, 1918, p. 667.) These appear to us to be supported by ample authority. Moreover, there does not seem to be any reason why the City cannot use its funds by borrowing from them directly when amply secured, without going through the formality of placing them into the banks and borrowing them from the banks at a higher rate of interest than the banks are paying to the City for the identical money.

Our conclusion with regard to the validity of the statutes and ordinances in question, therefore, is that they provide a lawful means of financing the needs of the City out

of its own funds. The only feature of the ordinances which can give rise to any question is that which provides for drawing on the aggregate of funds. This, as stated above, seems to be more a matter of nomenclature than a question of real substance. If the point should be raised at any time and the courts should hold that it was not proper to draw on the aggregate or that any particular fund or funds cannot be used for the purpose, it would be merely a matter of bookkeeping to transfer the loan to the proper accounts. This can be done either with or without action of the City Council, since the statute would give authority to the Executive Officers to make such transfer on the books to only such funds as are lawfully available where the Council has authorized the use of all the funds.

A question has been raised concerning the precise meaning of the following sentence which appears in the statute:

“Before any money shall be paid out upon such advance the city council shall by the same ordinance require such board of local improvements to make or execute and deposit with the city comptroller of such city, who shall give a receipt in writing therefor, a pledge or security in writing to the entire extent of such special assessment or special tax, for the repayment of such advance out of the proceeds of such special assessment or special tax.”

We do not regard the words “entire extent of such special assessment” to mean that the City is prevented from securing such an advancement if a portion of the proceeds from a special assessment have been collected and spent, provided that there remains uncollected and unspent enough to make the reimbursement as certain as the law contemplates. Whenever the loan is made, however, the whole of the balance of the assessment must be pledged, even though it may be more than sufficient to secure the loan.

We have heretofore approved as to form the pledge prepared by the Board of Local Improvements, and we have prepared a form of receipt for the comptroller, which we submitted to him. Thus, all the formalities required by stat-

ute have been complied with, and if the ordinances of July 2d have been signed by the Mayor and you are satisfied with the security it will be proper to make the advancement.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Stores May Front on Residential Street at Its Intersection With Commercial Street.

August 7, 1923.

HON. ALLEN B. POND, Chairman Board of Appeals.

Dear Sir:

We have your request concerning opinion as to whether stores may front on a residence street at its intersection with a business street where the particular area has been zoned for commercial purposes.

The case in question arises on account of construction work now in progress on South Shore Drive. The east and west arm of this boulevard is zoned for commercial purposes. The building is being erected at the corner where the street turns to the south, and the commercial area extends 125 feet into the north and south arm, which is zoned beyond that point for apartment purposes. The residents along there protest against stores facing on the north and south arm.

The Zoning Ordinance makes no distinction with reference to the place where the entrances or show windows are to be located within a commercial area. There is provision made for excluding the location of such accessory features in the case of business carried on in an apartment hotel in

an Apartment District. (See Section 7 of Zoning Ordinance.) The very fact, however, that such mention of entrances and show windows is made in the case of Apartment Districts precludes the idea that the ordinance prohibits such entrances and show windows in any part of a commercial district.

We are forced to hold, therefore, that the law does not require the parties who are putting up the building in question to locate their entrances or show windows on the arm of the street which is zoned for commercial purposes.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Arrests for Violations of the Prohibition Law Committed in the Presence of Officers.

August 8, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In reply to your request for an opinion on the present status of Illinois law in regard to search and seizure without a search warrant, we beg to call your attention to the following Illinois and Federal cases and to collate the propositions of law therein laid down in the following language:

In the case of *People v. Brocamp*, 307 Ill. 448, the Supreme Court of Illinois held that when police officers had broken into a private home and searched the premises and thereby secured articles which were admittedly stolen goods, such articles could not be received in evidence if the search

was made without a search warrant. The court does, however, as will be noted in the following quotation, provide that an application for the return of the property must be made before the beginning of the trial. On page 453 the court said:

“It is very clear that the plaintiff’s constitutional rights were ruthlessly and unlawfully violated. The officers had no right whatever to enter his home by force or by permission of another in his absence and search his premises without first obtaining a proper warrant for such search and seizure, as required by our constitution. There can be no question but that the plaintiff in error has been compelled, under the showing in the record, to give or furnish evidence against himself, in violation of his constitutional rights. There was a legal way for the State to proceed by its officers in the search of his premises, by first making a showing that they were entitled to a warrant authorizing them to search for and seize the particular articles named, if they could make a *prima facie* showing that either the State or the prosecuting witnesses had the right to forcibly seize the articles for their purpose and use. Such action of the officers in forcibly or unlawfully and without a warrant entering the plaintiff in error’s home and searching it and seizing the articles aforesaid has in unmistakable terms been condemned by the courts of this country. If an American’s constitutional rights cannot be protected against ruthless and unlawful acts of the character disclosed in this record, then the constitution guaranteeing such rights is a mere nullity and our boasted rights of liberty are vain boastings. There was undoubtedly a remedy in this case for plaintiff in error by which he could protect himself against the invasion of his rights, and he undoubtedly used his very best diligence in securing that remedy. He petitioned the court repeatedly, before the trial was entered upon, to make the legal investigation that would disclose whether or not his rights were invaded as he charged in his affidavit, but the court denied the motions at every turn. There is no denial anywhere in the record of his charge that his constitutional rights were invaded, and that the articles of property taken from his home, which he claimed to be his own, were put in evidence as exhibits against him in the trial. Under well considered decisions of the courts of this country it must be

held that the action of the court in denying his motions is reversible error.

An offer of proof made on the trial of a cause raises no other question than that of the competency, relevancy and materiality of the evidence offered. Consequently the court, on an objection being made, cannot be expected to stop the trial of the case and enter upon the trial of a collateral issue as to the source from which the evidence was obtained. This court has repeatedly refused to enter upon the trial of such collateral issues even when the objection raised to the competency of the evidence was based upon the claim that the evidence had been secured by means of unlawful search and seizure, in violation of the defendant's constitutional rights. (*Gindrat v. People*, 138 Ill. 103; *Siebert v. People*, 143 *id.* 571; *Trask v. People*, 151 *id.* 523; *People v. Paisley*, 288 *id.* 310.) Other courts of this country have made the same rulings in substance. (*People v. Adams*, 176 N. Y. 351, sustained in *Adams v. People*, 24 Sup. St. 372; *Commonwealth v. Tibbetts*, 157 Mass. 519; *State v. Markhausen* (Mich.), 3 A. L. R. 1505.) In 10 R. C. L. 933, after laying down the rule of law that in the orderly course of the trial the court will not stop the trial to determine in what manner the evidence has been obtained, and that an objection that exhibits have been obtained by unlawful search and seizure will only be considered as raising an objection to the competency and relevancy of the evidence, it is said: 'It is obvious, and the courts have frequently declared, that if letters and private documents may be seized in violation of the constitutional safeguard and held and used in evidence against a citizen accused of crime then the constitutional provision is ineffectual and of no value.' It is further stated by the author, in substance, that as the constitution guarantees the rights of the defendant in criminal cases, there must, of necessity, be a remedy. The author then states the remedy in substance, that the defendant should make timely application to the court, before the beginning of the trial, for an order directing the return to the applicant of the property or of the papers unlawfully seized, and that on such an application the question of the legality of the seizure must be fully heard, and if the court erroneously refuses to order such return and thereafter receives the property in evidence against the applicant over his objection, it is an error for which a

judgment of conviction must be reversed. The decisions of the Supreme Court of the United States and of several other courts of this country support the law laid down by that author in every particular, when the question of unlawful search and seizure is properly raised. (*Boyd v. United States*, 6 Sup. Ct. 524; *Weeks v. United States*, 34 *id.* 341; *Gould v. United States*, 41 *id.* 261; *Amos v. United States*, *id.* 266; *State v. Markhausen*, *supra.*) Some of the State courts hold that it is not even necessary to make a preliminary motion for a hearing to determine whether or not there has been an unlawful search and seizure, but that the objection to such exhibits should be sustained on the trial whenever it is made to appear that the exhibits have been obtained by unlawful search and seizure. *State v. Slamon*, 73 Vt. 212; *State v. Height*, 117 Iowa, 650.

This case raises in this court for the first time the question whether it is the duty of the court to determine whether or not property and papers of the defendant were obtained by unlawful search and seizure when an application has been made in apt time for their exclusion, and it is our duty, in view of our obligations to support the constitution, to hold that it was the duty of the trial court to inquire into the truth of the charge of defendant, and, if it be found to be true, to sustain his objection to the introduction of all exhibits that were claimed by him as his property and taken from his home by means of unlawful search and seizure. Our holding is that the unlawful search and seizure aforesaid violate the provisions of our State constitution. Said provisions of the Federal constitution, and the Federal decisions thereon, are quoted and cited as very applicable because only of the similarity of the provisions aforesaid of both constitutions."

Attention is called to the fact that the Federal Courts have laid down precisely the same rule in regard to search for liquor kept in violation of the Volstead Act. In the case of *Berry v. United States*, 275 Federal, 680, at page 681, the court said:

"These same agents took two other and similar bottles from the ice chest in defendant's place. They had no search warrant. One of the bottles was marked by one of the agents at the time and later was sent to a govern-

ment chemist, who made an analysis and at the trial testified, over objection, that the liquid was beer containing alcohol in excess of the amount permitted by the act; and the bottle and contents were admitted, over objection, as exhibits in evidence. So the conviction is plainly bottomed on the exhibit and the chemist's testimony; that is, on evidence which never would have had any existence but for the government's violation of the restraint put upon it by the Fourth Amendment. Cases of this kind must be judged as if the illegal seizure had never been made.

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; *Gould v. United States*, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed.—(February 28, 1921).

The judgment is reversed, with directions to grant a new trial."

However, the Federal courts have introduced an important qualification in that they hold that whenever liquor is sold in a public place of business and that the evidence of its being so sold is manifest to agents or police officers through sight or smell of the presence of liquor, that in that case the premises may be searched and liquor may be seized without a search warrant having been first secured. In the case of *O'Connor v. United States*, 281 Fed. 396, at page 399, the court said:

"The agents who took these liquors were not trespassers; they were officers of the law, charged with the duty of investigating violations of the act. Title 2, No. 2. In the performance of this duty, they had all the power and protection—

"Which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States, *id.* No. 28.

As such officers they had the right, without a written warrant, to arrest any person committing a crime in their presence (Blackstone's Comm., Book IV, p. 292; 1 Bishop Crim. Proc., Nos. 166-171, 182-184), and to seize and retain the evidence of the commission of such crime for use in the subsequent prosecution of the offender. They would also have a right to seize liquor unlawfully possessed and hold it for subsequent dispo-

sition by the court. As noted, the premises in question were not occupied and used as a dwelling only, but as a business place open to the public, and therefore were not within the exception of Section 25 of Title 2 of the National Prohibition Act, and the prohibition agents had a legal right to enter thereon. Having lawfully entered, and being made conscious, through sight and smell, of the possession of the liquors, and noting conditions evidencing that the liquors were kept in violation of the National Prohibition Act, they had the legal right to seize them without first securing a search warrant. *United States v. Borkowski* (D. C.), 268 Fed. 408; *Kathriner v. United States* (C. C. A. 9), 276 Fed. 808; *United States v. Bateman* (D. C.), 278 Fed. 231; *United States v. Snyder* (D. C.), 278 Fed.

The petition for the return of the liquors is denied."

That the foregoing quotation is sound law, cannot be questioned, and there is no doubt but that the Supreme Court of Illinois would not hesitate to follow it. In the case of *United States v. Borkowski*, 268 Fed. 408, the court held that an officer may arrest whenever he actually sees the commission of a misdemeanor or felony and that he may be informed of the fact that a crime is being committed by the sense of smell as well as the sense of sight. In that case the officers smelled a still in operation in an adjoining house. They entered without a search warrant seized the still and its contents, and it was held for the foregoing reasons that this was not an unlawful search and seizure and that a search warrant was not necessary.

In conclusion, the following propositions of law may be set forth: If a search is made of a private home or dwelling without a search warrant, and if there is nothing to inform the officers, through their sense of sight or smell, before entering upon the premises, that a crime is being committed, any such search would be unlawful and any property taken in such search would have to be returned upon application being made for the return of same at some time prior to the beginning of the trial. In any public place of business where the general public are invited to enter upon the premises, should the officers be informed through their sense of

sight or smell that there is liquor unlawfully kept upon the premises, the officers may search the premises and seize the liquor without a search warrant. An officer may also enter and search a private dwelling or residence without a search warrant if, through his sense of sight or smell, he is informed that there is a still in operation or that liquor is being unlawfully sold or that some other crime is being committed.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Ordinance of 1869 Establishing Dock Lines.

August 8, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have before us the letter originated by the Harbor Master, in which he asks our opinion as to the present legal status of the ordinance establishing dock lines on the South Branch of the Chicago River, passed July 11, 1869. (See Hoover, *Special Ordinances*, 1915, pp. 42-46.)

Although passed forty-four years ago, the ordinance in question is valid, and we know of nothing which has interfered with it so as to render it inoperative. At the time of the revision of the book of special ordinances in 1915 a great deal of attention was given to the question of whether the ordinances to be published therein were in effect or not. Consequently it is our custom to assume that any special ordinance which appears in the Hoover revision was in effect at

the time it was published. Since you have asked specifically about this ordinance, however, and there seems to be a doubt implied by your question, we have taken the pains to examine its present legal status more carefully.

The Common Council in 1869 had ample power to pass ordinances of this character. There were several provisions of the charter relating to its control over the waters of the harbor, among which the following clause standing by itself was sufficient for the purpose:

“Second. To remove and prevent all obstructions in the waters, which are public highways in said City, and to widen, straighten and deepen the same.” (Tuley Revision, 1873, p. 403.)

By Section 1 of the ordinance the South Branch is ordered widened to an average of 175 feet, and dock lines are established. Section 2 provides for an appraisal of damages and recompense due to the owners of real estate necessary to be taken. Section 3 fixes the amount to be assessed for land specially benefited, and Section 4 provides for the payment of a certain sum or such part thereof as may be necessary as the City's part of the expense of the improvement. All this appears to be in strict conformity with the law.

There was a revision of the ordinances of the City in 1873 (Tuley's), but there was nothing contained therein affecting the ordinance of 1869 which we are considering. There was no general repealing clause, and therefore there was no occasion for a saving clause, and the ordinance of 1869 remained in force.

Meanwhile the Cities and Villages Act was passed, and this was later adopted by the City. This act contains ample authority for all that is contained in the ordinance of 1869. Hence, there was no repeal either directly or by implication.

The only thing that remains to be considered is the effect of the repealing and saving clauses of later revisions of the code.

The revision of 1881, compiled by Egbert Jamieson and Francis Adams, repealed all public or general ordinances in conflict with it so far as they were inconsistent therewith, and saved all private or special ordinances. Whether this is regarded as a special ordinance or not, there was no repeal, for there was nothing in the Code of 1881 that conflicts with it.

The repealing section of the Beale revision of the Code in 1897 contained a somewhat similar provision repealing only those ordinances which conflict with it, and it must be construed in the same way because there was nothing in it which conflicted with the ordinance we are considering.

The Tolman revision of 1905 contains a more sweeping repeal of general ordinances passed prior to its enactment, but saves this ordinance by what amounts to an express reservation in using the words "all ordinances establishing dock lines, which were in force at the time of the passage of this ordinance, are not hereby repealed."

The repealing section of the Brundage revision of 1911 contains practically the same exclusion. It reads "all ordinances establishing dock lines, bench monuments and grades which were in force at the time of the passage of this ordinance, are not hereby repealed."

In the latest revision (Ettelson, 1922) the repealing section excludes "ordinances establishing or confirming dock lines, bench monuments, grades, leases and dock privileges."

We have traced, above, all statutes and ordinances which might have affected the status of the ordinance of June 11, 1869, from the date of its enactment up to the present time, and find that it is still in effect.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Withdrawal of Names from Frontage Consent Petitions Before Permit Is Issued.

August 11, 1923.

JOHN C. McDONNELL, Esq., Chief, Bureau of Fire Prevention and Public Safety.

Dear Sir:

We have before us your letter and accompanying papers concerning the application of the Texas Company for the installation of a filling station at 7032-60 Vincennes avenue.

It appears that signatures were obtained to a frontage consent petition which were submitted to the Bureau of Maps for verification. That when returned to you the Superintendent of Maps reported that the frontage signed up was sufficient. That afterwards a protest was filed objecting to the issuance of a permit, such protest containing the names of some of the signers of the original frontage consent petition. That this was followed by the filing of affidavits in which some of these parties formally withdrew their consents. That if such withdrawals are allowed there will not be enough consents left to constitute the majority required by law for the issuance of the permit.

The specific question you ask is the following: "After these persons consent to this station and oil company in good faith proceeds and procures signatures, have the signers a right to withdraw their names?" We quote your question because parties representing the protestants have raised other questions concerning the petition which we do not deem it necessary to pass on, since this controversy can be decided on the point about which you asked.

This department has held on numerous occasions that in such a situation as is here presented the owners of property may withdraw their consents at any time until final

action is taken on the application for a permit. (See Opinions, December 9, 1915, p. 553; March 21, 1916, p. 896.)

This seems to be the settled law in this state. The Supreme Court expressed its view on this point in one case as follows:

"Our examination of the decisions cited by counsel on either side from other courts on analogous statutes has led us to the conclusion that the act of signing such petitions is not an irrevocable act, and that it may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it."

* * * * *

"To absolutely prohibit a citizen from withdrawing his name from a petition voluntarily signed by him, at any time after it has been presented to a body authorized to act upon it, would be a harsh and unreasonable rule and also liable to work great hardship."

Littell v. Board of Supervisors, 198 Ill. 205.

Since this decision was rendered the Supreme Court has passed on the same question repeatedly, and each time it has adhered to its position as expressed above. A number of these cases are cited in *People ex rel. School Directors v. Oakwood*, 290 Ill. 45, where the court again stated this to be the law.

In view of the unbroken line of decisions on this point we are bound to advise you that you would not be justified in issuing the permit in question.

We return herewith complete file of papers which you submitted with your letter.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Retail Beverage License at Location for Which Similar License is in Existence.

August 11, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether it will be proper to issue a retail beverage license for the premises at 1122 West 17th street.

You state in your letter that these premises were occupied by Peter Smolic, who had a retail beverage license, up to July 3, 1923, at which time they were vacated by him, and that on said date application for a similar license for the same place was made by one Paul Pavlick. You further state that the former license is still in existence, never having been canceled, revoked or transferred, and that the former licensee, Smolic, declares that he is expecting to open up the same business at another address and wants to retain his license.

There is no insuperable obstacle in the way which will prevent the issuance of another license if the premises have actually been abandoned by the first licensee, since a shift in locations is permitted under the law. We believe, however, that either the owner of the premises or the first licensee should give some written assurances that Smolic will not assert his right to carry on his business there under the license issued to him—otherwise there might result some embarrassment to the City or its officers by reason of conflicting claims.

Any document stating that he no longer desires to pursue the business at the location in question, signed by Smolic, would be sufficient for you to act on the theory that the premises are vacant. If that cannot be obtained, the owner of the premises should make formal affidavit stating that the premises are no longer in Smolic's possession, giving the cir-

cumstances and reasons for their vacation and declaring that Smolic has no claim to possession.

If you are presented with either one of these documents and there is no other objection to the issuance of a license at the place in question, it may be granted.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Filling Station Permit On Application Presented Before Passage of Zoning Ordinance.

August 14, 1923.

HON. ALLEN B. POND, Chairman, Zoning Board of Appeals.

Dear Sir:

We are in receipt of a letter from Mr. H. T. Frost, Technical Advisor of the Board of Appeals, in which he makes inquiry concerning the issuance of a permit for a gasoline filling station at the southwest corner of St. Lawrence avenue and Marquette road.

The question asked in the letter is whether the Council order passed on the same night and immediately after the zoning ordinance was passed, directing the withholding of permits for buildings which would conflict with that ordinance, can be sustained.

It would be misleading to answer this question in categorical fashion. The order amounts to a direction to suspend the operation of ordinances under which permits could be obtained. Generally speaking, an order which amounts to a direction to suspend the operation of an ordinance can-

not be sustained. But it is doubtful whether the rights of the parties in the instant case can be determined on that point.

The Zoning Ordinance was passed on April 5, 1923, and was published on May 2, 1923. Hence, it went into effect on May 12, 1923. In the interim notice was served on parties who contemplated building that they must not build contrary to its provisions. This notice not only was given by the passage of the Zoning Ordinance and the order withholding permits, but was also promulgated through the departments which refused the permits. There may be some question about sufficiency of notice in this case because certain permits were issued, but that is a question of evidence.

The point we make is the same as we have had occasion to call your attention to several times, viz., that the mere fact that a person hurried through an application for a permit does not give him such a vested or substantial right that he can override the Zoning Ordinance.

The enabling act contains the following provision:

“The powers by this act given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted.”

We do not regard the securing of a permit for a building as sufficient to bring the property within the terms of the above clause, which was manifestly intended to prevent loss to a person who had invested his money in property that was zoned in such a way as to render his improvements useless if he could not maintain them for the purpose originally intended.

An ordinance that is passed under the police powers is supposed to operate alike on all persons (or property), similarly situated. This is true in the case of a nuisance in a residential district even to the extent of compelling the removal of structures that were in existence before the district became residential. Therefore, unless the above quoted clause applies, there is no exception from the operation of the Zon-

ing Ordinance, which was passed pursuant to the police powers.

In support of our position we cite the case of *Standard Oil Co. v. City of Danville*, 199 Ill. 50, where the court required the removal of oil tanks of a capacity of more than five barrels when residences were built near the plant. There are other decisions involving the same principle, in all of which the court held that priority of location is not what controls.

Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322.

Oehler v. Levy, 234 Ill. 595.

People ex rel. Roos v. Kaul, 302 Ill. 317.

From these decisions we gather that the rule will be applied in the case of the Zoning Ordinance if it can be shown that the building about to be erected is sufficiently objectionable to warrant the invoking of the police power.

We have heretofore recommended that the question of whether rights have attached on account of permits having issued pending the going into effect of the ordinance should be avoided if possible. Our reason for this is, first, that this is something that is only temporary and time will efface the question, and, second, there may be equities that have arisen in the particular case which might bring an adverse decision that would be misunderstood as a blow to the ordinance. We feel, however, that if a test case were made of the one before you upon your refusal to allow the work to proceed, the courts would sustain you.

The Board of Appeals is, therefore, entirely free to decide this case on its merits, taking into account the equities involved.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Whether Accounts Should Be Charged on Comptroller's Books When Licensee Has Assigned Rights to A New Corporation.

August 14, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of recent date you inform us that you have a number of accounts on your books relating to contracts for privileges granted to the Chicago Telephone Company and that all of the interests of this company are now being operated by the Illinois Bell Telephone Company. You then ask whether it would be advisable to change the accounts so that they will run against the Illinois Bell Telephone Company.

We do not consider it good policy to alter the books of the City so as to indicate acquiescence in a transfer of rights until there has been action on the part of the City Council. There does not appear to be an express inhibition against the transfer of these rights, and it may be that the City will lose no advantage by recognizing that such transfer has been made. Nevertheless, since there is no formal record showing that the City Council at any time assented to the transfer, and there does not seem to be any important reason for changing the books, we deem it the better part of wisdom to continue to treat the grantee as still standing in that relation to the City.

If any reason for making the change should arise in the future it will be time enough to act when that takes place.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Contract to Install Ornamental Lighting System, Approved by Former Commissioner of Gas and Electricity, Installation of Which Is Now Discovered to be Dangerous.

August 17, 1923.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

You have requested an opinion from the Corporation Counsel as to the liability of the City and the duties of the Commissioner of Gas and Electricity under the following statement of facts:

Some time ago a contract was entered into between the City of Chicago and the Woodlawn Business Men's Association, whereby the said association agreed to install an ornamental street lighting system on 63d street between South Park avenue and Stoney Island avenue. The said association agreed to pay the cost of the installation of this system. The system was then to be turned over to the City of Chicago to be maintained and operated by it. The contract provided that the work should be done subject to the approval of the Commissioner of Gas and Electricity and that notice should be given the Commissioner at the time of starting the work. The former Commissioner of Gas and Electricity, Mr. Carlson, approved the plans as submitted by the said association and approved the blue prints, showing how the high voltage wires were to be installed. Pursuant to this approval, work was commenced by the said association and approximately half completed. It was then discovered by the present Commissioner of Gas and Electricity that the system of installation of these wires is highly dangerous to life and property and in violation of the rules and regulations of the Department of Gas and Electricity. The question now arises whether the City of Chicago can compel the said association to alter

this installation and whether the City would be liable in damages for breach of contract.

As an initial proposition of law, it is unequivocally true that if the present installation of these wires is in fact dangerous to life and property, such an installation constitutes a nuisance and the City of Chicago cannot be compelled to maintain and operate these wires in that condition under their contract, and it is the duty of the Commissioner of Gas and Electricity to see that the wires are not operated until the proper safeguards are provided.

The fact that the wires were installed in violation of certain rules and regulations of the department does not in any way alter the City's liability for breach of contract, because these rules and regulations are not City ordinances, and therefore the Commissioner has the power to waive them. He did so waive them by approving the blue prints which showed the manner of installing the wires. The said association relying upon this approval then commenced work and expended large sums of money. Should the City now refuse to carry out its contract, it would very likely be liable for damages for breach of this contract, the measure of the damages being the amount of the sums expended and besides, nominal damages for the failure to carry out the contract.

It is therefore recommended that the best solution of this situation is to enter into an agreement with the said association whereby the said association agrees to complete the work of installing the wires in accordance with the rules and regulations of the department and in accordance with the approval of the present Commissioner of Gas and Electricity, and that the City of Chicago agrees to change the location of the wires already installed at its own expense, and then to maintain and operate the entire system as it had originally agreed to do.

Should you wish a draft of such an agreement to be drawn up, together with a draft of an ordinance granting authority to the Commissioner of Gas and Electricity to

enter into such an agreement, this office will be pleased to prepare the same upon your request.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Prohibition Against Operating Garage
Within a Certain Distance from a Hospital
Includes a State Infirmary.**

August 17, 1923.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

We have before us a letter from the former Commissioner of Buildings, in which he inquires whether the Illinois Eye and Ear Infirmary is to be regarded as a hospital in determining the propriety of issuing a permit for a garage in close proximity thereto.

It appears that application has been made to your department for a permit to erect a garage at the southwest corner of Peoria and Monroe streets. Directly to the rear of the proposed location is the State institution known as the Illinois Eye and Ear Infirmary. A letter of the architect is attached to the communication from your department, and this contains a sketch showing that the proposed building would be only fifty feet away from the infirmary. The point is also made in this letter of the architect that the institution does not operate under a hospital license, and it is contended that for that reason it is not a hospital—or at least that the inhibition in the City ordinances against erecting garages near hospitals does not apply.

We know of no reason whatever for holding that the institution in question is not a hospital. Its very name implies it. Webster defines an infirmary as follows:

“INFIRMARY—A hospital, or place where the infirm or sick are lodged and nursed gratuitously, or where patients who are not resident are treated.”

Since the ordinances do not materially alter the commonly accepted definition, we are constrained to hold that the infirmary comes squarely within the meaning of the word “hospital,” as used in Section 929 of The Chicago Municipal Code of 1922.

As to the other suggestion, which is made in the letter from your department, to the effect that because the City has no direct control over the erection of buildings by the State and that therefore the question arises as to how they should be treated, we can find no more ground for upholding such a view than exists in the case of the contention of the architect. This is true even if we could find no means of enforcing the frontage consent provisions relating to hospitals contained in Section 930, which in fact would probably be observed by State officers as a matter of comity.

Section 1850 of the Code defines a hospital, and, as already stated, the definition includes this infirmary. Section 1851 provides that all hospitals, except those operated by the Federal, State, County or City authorities, shall be required to obtain licenses. From this it follows that the ordinances specifically point to such institutions and exclude them from the license provisions, but there is no exclusion as to any other provisions of the Code relating to hospitals. Under the well recognized rule relating thereto the ordinances must be understood as applying in all other cases. It is true that there might be a clash of authority. In fact, that sort of thing has happened. But in most cases conflicts of this kind can be adjusted on the basis of the comity existing between public officers, so that the officers of each governmental authority will observe the law of each of the other governmental authorities.

We, therefore, advise you that the provisions of the Code relating to the location of the garage you mention will apply in the case before you.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Lay-Offs Under Civil Service When There Is a Lack of Work.

August 21, 1923.

MR. WM. F. FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

I have your letter of the 17th instant advising that the Civil Service Commission is in receipt of a report from the President of the Board of Local Improvements entitled "Lay-off a/c Positions Abolished" for the following named persons: Julius G. Gabelman, Assistant Chief Engineer of Streets, and Frank Lupe, Assistant Chief Engineer of Streets, and requesting the opinion of this Department as to whether or not the department head has power to abolish positions created by the City Council and referring to a section of the preamble of the appropriation bill for 1923, and inquiring as to its effect.

The power to create offices, positions and places of employment in the classified service belongs to the City itself, and can only be done by an appropriate ordinance of the City Council. (*People ex rel. Jacobs v. Coffin*, 282 Ill. 599.)

Offices, positions and places of employment in the classified service cannot be created by the head of a department; neither can such offices, positions or places of employment when once created be abolished by the head of a department.

It is provided in the preamble of the Appropriation Bill that "in case of any vacancy in any such position here appropriated for, the head of the department in which such vacancy occurs shall not be required to fill the same if, in his judgment and discretion there is no necessity therefor." The head of any principal department of the municipal government has the right from time to time to lay off any member of the classified service for lack of work or lack of funds, reporting his action in this regard when taken to the Civil Service Commission so that the proper records can be kept and the person so laid off placed upon a reinstatement list for certification when his services are next required.

As to the particular subjects of your inquiry, in my opinion the President of the Board of Local Improvements should forthwith lay off the members of the classified service in question for lack of work (if in fact there is a lack of work) and report his action to the Civil Service Commission.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Cost of Removing and Readjusting Electric
Light Poles May be Included in Estimate
of Costs for Special Assessment
Improvement.**

August 21, 1923.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

Mr. J. B. Hittel, chief street engineer, has requested this department to submit an opinion to the Board of Local Improvements as to whether the .

“Cost of removing and readjusting city electric light poles is a proper charge to be included in the engineer’s estimate of cost for an improvement to be made by special assessment.”

This is a matter of very great importance and calls for the exercise of a high degree of care and caution on the part of the Board before arriving at a final determination of the question, and accordingly I have given the subject a great deal of study.

The question of what constitutes a local improvement is discussed at considerable length in the case of *City of Waukegan v. DeWolf*, 258 Ill. 374, and the conclusion there reached was that

“The question is not determined by the fact that some property in the municipality is benefited to a greater degree than other property, but does depend upon the nature of the improvement and whether the substantial benefits to be derived are local or general in their nature. If the purpose and effect are to improve a locality, it is a local improvement, although there is incidental benefit to the public; but if the primary purpose and effect are to benefit the public it is not a local improvement, although it may incidentally benefit property in a particular locality.”

The same view is held in the case of *State of Minnesota v. Reis*, 38 Minn. 371, where this language is used:

“The essential elements of a local improvement are that the improvement shall benefit the property upon which the cost is assessed in a manner local in its nature, and not enjoyed by property generally in the city.”

Crane v. Siloam Springs, 67 Ark. 37.

City of Chicago v. Loeffler, 246 Ill. 43.

City of Chicago v. Blair, 149 Ill. 310.

It was held in *Northwestern University v. Village of Wilmette*, 230 Ill. 80, that whether or not the improvement will be a benefit to all the property in the village is not the test. In that case the court said:

“If the improvement will enhance specially the property adjacent to which it is made the improvement

is a local improvement. It has been uniformly held that although the construction of a general system of waterworks for fire protection and general use is not a local improvement, the laying of water mains for the distribution of water along a particular street for the use of residents is a local improvement which may be paid for by special assessment."

Village of Morgan Park v. Wiswell, 155 Ill. 262.

Hughes v. City of Momence, 163 Ill. 535.

In *Ewart v. Village of Western Springs*, 180 Ill. 318, the same doctrine was applied to the construction of a plant and system for lighting the streets by electric light, including the power house, generator engine, electric conductors, lamps and necessary appurtenances. Here, also, the Supreme Court said:

"After a consideration of the cases in regard to the construction of waterworks by special assessment, it was held that, so far as lighting the streets by electricity included the power house and electric generator engine, it might be regarded as an improvement of general utility which could not be constructed by special assessment, but that the poles, wires and lamps which are the means of furnishing the necessary light for the protection of the property of citizens constituted a local improvement."

Under the decision herein cited municipalities have the undoubted right to erect poles and lay wires and conduits for the distribution of light by means of electric current, and that the cost thereof may properly be charged and paid for by special assessment.

The question of the reasonableness of this kind of an improvement may, however, arise. If it should be shown that the existent system of lighting upon a street in which it might be proposed to remove electric light poles from their present position to another location, is adequate for the protection of the public, then the courts may refuse to confirm the proceeding on the same grounds as in any other kind of a proposed local improvement where unreasonableness would be proved.

Where a part of the cost of an improvement is to be paid for out of the proceeds of a bond issue, and where in the same improvement it is proposed to remove, replace, lay conduits for underground wires and connect up all necessary wires, it seems to me an amount of money equal to the estimated cost of making such changes of removing electric light poles, etc., should be transferred from the proceeds of such bond issue and applied exclusively to the cost of making and completing all city electrical work along the line of the proposed improvement.

Respectfully submitted,

PHILIP J. McKENNA,
Attorney, Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Ownership of Tubes Placed Within Tunnels Under City
Streets by Chicago Postal Pneumatic Tube Co.
After Permits Expire.**

August 21, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You ask what action the City should take regarding the tubes and tunnels placed or dug in the streets, alleys or other public grounds of the City on the expiration of franchise granted to Chicago Postal Pneumatic Tube Company in ordinance and amended ordinance appearing on pages 1922 *et seq.* of volume of Special Ordinances—(Hoover, 1915).

The original ordinance was passed July 13, 1903. It stated that the rights and privileges conferred upon Chicago Postal Pneumatic Tube Company were granted for a term

of twenty years from and after the acceptance of the ordinance. The ordinance was accepted and bond filed October 12, 1903. The term, therefore, expires October 12, 1923.

An amendment to the original ordinance was passed June 1, 1909. It was accepted and bond filed June 17, 1909. It granted the company the right to dig a tunnel under the river at Fifth avenue or Wells street. The amendment stated that the rights and privileges conferred shall cease and determine October 13, 1923.

An order passed by the City Council, November 14, 1910, permitted the placing of tubes in the streets to connect Station "W" with the Chicago and North Western Railroad terminal.

The original ordinance and its amendment provide:

"At the expiration of this grant all the tubes of this grantee then in the streets, alleys or other public grounds shall be and become the absolute property of the City of Chicago, and this grantee hereby and in consideration of these presents agrees to convey the said tubes free of all liens or incumbrances by proper deed of conveyance to the City of Chicago or to any person, firm or corporation that may be selected by said City of Chicago."

Even without this provision the tubes and tunnels became the property of the City of Chicago immediately on being laid in or dug in the streets, alleys or public grounds, subject to the right of user by the company until the expiration of its franchise October 13, 1923. They are in legal phrase "attached to the realty" and cannot be removed, nor would the courts allow the company to attempt to interfere with the use of them by the City or its grantee after that date.

Should it appear that there are tubes in property not owned by the City, as for instance in private property or in streets held by the City under a common law dedication, there might be some question of ownership as between the City and the abutting property owner. But as between the City and the company the tubes and tunnels become the property of the City October 13, 1923, in the case supposed.

A deed would be convenient and should be obtained, if possible, but it is not absolutely necessary.

The City should take possession October 14, 1923, of all the tubes and tunnels, wherever they may be.

Respectfully submitted,

DANIEL V. GALLERY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Revocation of Permits Issued The White Construction
Co. Account Broadway System of Sewers
for Violation of Contract.**

August 23, 1923.

HON. JOHN J. SLOAN,

President, Board of Local Improvements.

Dear Sir:

Your attention is directed to your letter of June 12th addressed to Francis X. Busch, Corporation Counsel, inquiring as to the right of the City of Chicago to revoke the permits issued to The White Construction Co. by the Bureau of Sewers and the Bureau of Streets for the so-called Broadway System of Sewers.

We have procured and examined the duplicate permits on file in the department named for the improvements in question, and have attached copies of the same to this communication. You will observe the permit issued by the Bureau of Sewers, No. 29886, specifically obligates the contractor to commence work thereunder on the 2d day of January, 1923.

This provision is a reasonable and *material* limitation upon the rights acquired by the licensee. It was undoubtedly inserted in the permit in conformity with the requirements of the first paragraph of Section 3714 of the 1922 Municipal Code, and it is our opinion that the Bureau of Sewers possesses the power to revoke this permit because the licensee designated therein has been guilty of a substantial violation of a *material* clause or provision thereof.

A different situation exists with reference to the permits issued by the Bureau of Streets, Nos. A-1377 to A-1380, inclusive. These permits simply fix the time when the work is to be completed. Under them, the contractor may begin work at any time in its discretion, and the City has no right to revoke them unless it can clearly demonstrate that the contractor has delayed the beginning of the work to such an extent that it cannot possibly complete the same within the time limited by the permits.

There is, however, another aspect of the case which remains to be considered. The permits are merely incidental to the contract between the City of Chicago and The White Construction Co. If there is a valid enforceable contract, it is more or less immaterial whether the existing permits are or are not cancelled, because the contractor would always have the right to demand and secure any and all permits necessary and indispensable to the performance of the work called for by the contract. But if the contract itself is invalid then all licenses or privileges granted or acquired in pursuance of the contract are likewise invalid.

We have procured the original contract from your department. It is dated October 28, 1922, and contains the following provisions:

“Said work to be commenced on or before the 7th day of November, A. D. 1922, to progress regularly and uninterruptedly after it shall have been begun, excepting as shall be otherwise ordered by the Board of Local Improvements of the said City of Chicago, and to be finished and fully completed on or before the first day of December, 1924, the time of commencement, rate of prog-

ress and time of completion being essential conditions of this contract. Provided, however, that if the time of performance of the contract herein be for any reason, either expressly or by implication extended, such extension shall not affect the validity of this contract.”

The requirements that the work be commenced on or before the 7th day of November, 1922, and thereafter progress regularly and uninterruptedly being of the essence of the contract, a failure on the part of the contractor to observe and comply with these requirements constitutes a breach of the contract, and gives to the party who is not in default in the performance of his or its obligations the right to annul or cancel the contract because of such breach by the other party.

It follows, therefore, that if the City of Chicago, through its Board of Local Improvements, has not expressly or impliedly extended the time of the contractor for the commencement of this improvement, or has not directly or indirectly waived the breach of the contract by the contractor, it has the right, now, by the service of proper notice upon the contractor, to cancel and revoke any permits that may have been issued by the Superintendent of Streets or the Superintendent of Sewers, or the officials of any other departments of the City government for the construction of the work.

There is, of course, another mode of procedure open to the City in the present situation. That course of action is defined by Section 56 of the Local Improvement Act under and by virtue of which the City may, where the making of a local improvement has never been commenced, dismiss the judgment of confirmation in the County Court at any time after the expiration of the term at which it was entered. You will find, however, by reference to the statute here under consideration, that if the contract for the work has been let, the court has no authority, after the expiration of the term, to entertain a motion to dismiss the judgment of confirmation over objection by the contractor to such an order. In other words, a dismissal of the judgment in the County Court,

after the expiration of the term, and after the contract has been let, can only be effected by and with the consent of the contractor.

The writer, of course, does not profess to be conversant with any facts that may have transpired subsequent to the letting of this contract and bearing upon or explaining the delay on the part of the contractor in commencing the work. As before stated, however, if such delay has not been assented to by the City or has not been occasioned by an act of omission or commission on the part of the City, then, The White Construction Co. has defaulted in the performance of a material and essential element of its contract, and you have the undoubted right to cancel the contract and revoke the permits, but written notice should be given the contractor of the election of the City so to do.

Very truly yours,

PHILIP J. McKENNA,

Attorney, Board of Local Improvements.

T. A. SHEEHAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

(Note: See later communications and opinions on this subject in the volume of opinions following this, under dates of June 19, 1924; December 4, 1924, and December 23, 1924.)

Whether a Corporation May Act as Undertaker When It Employs a Licensed Undertaker.

August 27, 1923.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

The Department of Law is in receipt of a communication, dated July 19, 1923, in which you make the following

request for a legal opinion, "Will you please give your opinion as to whether a corporation can hold itself out as an undertaker even where it employs a licensed undertaker in its business?"

The pertinent sections of the Code are Sections 1899, 1900 and 1907, here quoted.

"1899. *Undertakers to be licensed.*) It shall be unlawful for any person to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage or be in charge of an undertaking room, store or place, or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation or otherwise, without first obtaining a license as an undertaker or funeral director as hereinafter provided.

1900. *Application—qualification.*) Any person desiring a license to act as an undertaker, or to prepare dead bodies for burial or cremation, or to manage funerals, or to be in charge of an undertaking room, or to advertise or hold himself out to the public as an undertaker, or to solicit business as an undertaker, shall make application in writing therefor to the commissioner of health setting forth therein the name and residence of such applicant and stating that the applicant is a licensed embalmer, and giving the number of such applicant's state embalmer's card, and the location of the room, store or place where such applicant intends to carry on or conduct the business of undertaking. Every such applicant shall also furnish to the commissioner of health evidence that he has knowledge of and is familiar with the laws and ordinances of the city and the rules and regulations of the department of health governing and concerning the removal, preparation and burial or cremation of the dead, and that such applicant has a practical knowledge of approved and sanitary methods of caring for dead bodies and preparing the same for burial or cremation, including the embalming and disinfection of dead bodies, the commissioner of health shall give to each applicant not less than three days' notice of the time when said applicant will be required to furnish said evidence of his qualifications. Said applicant shall further furnish to said commissioner evidence that the applicant is a resident of the City of Chicago or maintains an under-

taking establishment in the City of Chicago, that he is of good moral character and a fit person to be licensed as an undertaker; and no license shall be issued unless the foregoing requirements have been complied with.

Provided, that in all cases of undertakers who were regularly licensed as undertakers in the City of Chicago prior to the passage of the Act of the General Assembly approved May 13, 1905, in force July 1, 1905, providing for a system of examination, registration and licensing of embalmers, etc., the same may be renewed each year without the presentation of a state embalmer's license or card.

1907. *Posting of license or certificate required.*) No person shall open, conduct, maintain or operate any store, room, place or establishment in which the business of undertaking is carried on, or prepare dead bodies for burial or manage funerals, or in any way advertise such place as an undertaking establishment, without first obtaining a license so to do, as hereinbefore provided, and posting or causing to be posted, and when posted, to keep posted, for the period of such license, in a conspicuous place on the wall of such store, room, place or establishment used for the undertaking business, the license so issued to him; and if such place, room, store or establishment be in charge or control or under the management of a duly authorized assistant, as hereinbefore provided for, in addition thereto there shall also be posted and kept posted, the certificate of such assistant, during the period for which it is issued, in the same manner as is provided for the posting of the undertaker's license; provided, that if at any time after the issuance of assistant's certificate said assistant shall cease to be in actual charge of said store, it shall be the duty of such assistant, or the person holding the license for said store, to forthwith surrender and deliver to the commissioner of health the certificate and license so issued. No person licensed hereunder as an undertaker or holding a certificate as an undertaker's assistant shall permit or allow any license or certificate issued to him to remain posted in any room, store, office or establishment used for the business of undertaking, after the expiration of the period for which such license or certificate was issued."

The Century Dictionary defines the words "conduct" and "manage" to mean to guide, direct, regulate while the other expressions used in the Code "to be in charge of," etc., are equally significant of the act of direction or regulation. No one of the expressions used signifies ownership of property. From the care taken by the Council to use only expressions indicative of management and not of ownership we are of the opinion that the purpose of the Code is to license and control those who will actively regulate undertaking rooms, direct funerals or take immediate charge of the care of the dead to the end that the laws of sanitation and health shall be enforced and the feelings and sensibilities of bereaved relatives respected and not to reach or control the ownership, as such, of undertaking establishments nor to determine who shall profit financially from their operation.

We are of the opinion, therefore, that the *ownership of an undertaking establishment by a corporation and the use of the corporate name upon the place of business as proprietor* does not violate the Code provided a duly licensed undertaker has full charge and responsibility for the business done and the *names of the undertaker and of the corporation are so used and made public* that ordinary persons would not be misled concerning the manner in which the business is owned and managed.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Construction of Undertaker's Ordinance—Whether All
Insignia of Business Must be Removed After
Death of Licensee—Whether Corporation
Which is Not Licensed and Whose Of-
ficers are Not Licensed May do
Business—When Barber
Acts as Agent.**

August 27, 1923.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

The Department of Law is in receipt of a communication dated June 11, 1923, in which you ask an opinion as to the advisability of starting suit in the following three cases:

“1. Case where an undertaker died about two years ago. The sign is still on the window and the place open, ostensibly to do an undertaking business. Request to remove sign has been ignored.

2. Place run by two men with their names on the window as undertakers, neither of whom has an undertaker's license. They are incorporated in the State of Illinois to do an undertaking business.

3. Place where an undertaker has a sign in a barber shop window, and we believe undoubtedly the barber is acting as an agent. We are handing you herewith two photographs of this case.”

The statement above of the three cases is quoted from your letter.

We are of the opinion that Case No. 1 does not state sufficient facts to permit of legal advisement. Sections 1899 and 1900 of the Municipal Code (which are quoted hereafter) would make it clear that all right and authority under the license of the deceased undertaker terminated at his death and that any person endeavoring to continue an undertaking business at that place must secure a license. But I find nothing in the Code that would make it the legal duty of the

owner or occupier of such place formerly used by an undertaker or of any member of the family or personal representative of the deceased undertaker to remove from the building external signs indicative of the former use as an undertaking establishment, if no one is now continuing or carrying on an undertaking business. We would not, therefore, feel justified in advising any form of action for the removal of such signs without some attempt being first made to determine as a fact whether anyone is continuing or conducting an undertaking business at that place.

Sections 1899 and 1900 of the Code relating to licenses for the conduct or management of establishments are as follows:

“1899. *Undertakers to be licensed.*) It shall be unlawful for any person to act as an undertaker, or to prepare a dead body for burial or cremation, or to manage a funeral, or to conduct, manage or be in charge of an undertaking room, store or place, or in any way to advertise or hold himself out to the public as an undertaker by card, sign, solicitation or otherwise, without first obtaining a license as an undertaker or funeral director as hereinafter provided.

“1900. *Application—qualification.*) Any person desiring a license to act as an undertaker, or to prepare dead bodies for burial or cremation, or to manage funerals, or to be in charge of an undertaking room, or to advertise or hold himself out to the public as an undertaker, or to solicit business as an undertaker, shall make application in writing therefor to the commissioner of health setting forth therein the name and residence of such applicant and stating that the applicant is a licensed embalmer, and giving the number of such applicant's state embalmer's card, and the location of the room, store or place where such applicant intends to carry on or conduct the business of undertaking. Every such applicant shall also furnish to the commissioner of health evidence that he has knowledge of and is familiar with the laws and ordinances of the city and the rules and regulations of the department of health governing and concerning the removal, preparation and burial or cremation of the dead, and that such applicant has a practical knowledge of approved and sanitary methods of caring for dead bodies and preparing the same for burial or cremation,

including the embalming and disinfection of dead bodies, the commissioner of health shall give to each applicant not less than three days' notice of the time when said applicant will be required to furnish said evidence of his qualifications. Said applicant shall further furnish to said commissioner evidence that the applicant is a resident of the City of Chicago or maintains an undertaking establishment in the City of Chicago, that he is of good moral character and a fit person to be licensed as an undertaker; and no license shall be issued unless the foregoing requirements have been complied with.

Provided, that in all cases of undertakers who were regularly licensed as undertakers in the City of Chicago prior to the passage of the Act of the General Assembly approved May 13, 1905, in force July 1, 1905, providing for a system of examinations, registration and licensing of embalmers, etc., the same may be renewed each year without the presentation of a state embalmer's license or card."

Paragraph 40, Sec. 1 and Paragraph 43 of Chapter 65a, Cahill's Statutes of 1921, relating to licensed embalmers in the State of Illinois, are as follows:

"P. 40. *License required to practice embalming.*)
Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* It is unlawful for any person to practice, or to attempt to practice, embalming without a certificate of registration as a registered embalmer, issued by the Department of Registration and Education, pursuant to the provisions of 'An Act in relation to the civil administration of the State government, and to repeal certain Acts therein named,' approved March 7, 1917, in force July 1, 1917.

After the first day of July, 1920, it shall, also, be unlawful for any person to serve, or to attempt to serve, as an apprentice under a registered embalmer without a certificate of registration as a registered apprentice, issued by the Department of Registration and Education, pursuant to the provisions of 'An Act in relation to the civil administration of the State government, and to repeal certain Acts therein named,' approved March 7, 1917, in force July 1, 1917. (Callaghan's 1920 Stat., p. 10624 (1).)

Act of March 7, 1917, is ch. 24a, P. 1 *et seq.*

P. 43. *Qualification for registration.*) Section 4.
A person is qualified to receive a certificate of registration as a registered embalmer:

- (a) Who is at least twenty-one years of age;
- (b) Who is of good moral character and temperate habits;
- (c) Who has graduated from the eighth grade of a common school, approved by the Department of Registration and Education; or who has completed an equivalent course of study, as determined by an examination conducted by the Department of Registration and Education;
- (d) Who has graduated from a school of embalming which requires as a prerequisite to graduation the completion of a course of study of at least six months' duration, approved by the Department of Registration and Education;
- (e) Who has studied embalming in this State under a registered embalmer for at least one year. However, no credit shall be given for the study of embalming in this State under a registered embalmer after the first day of July, 1920, unless the applicant, during the period of study was a registered apprentice. The time spent in the study of embalming under an embalmer, registered or licensed under the laws of another state or territory of the United States or of a foreign country or province, may be credited on the period of study required by the provisions of this paragraph; and
- (f) Who has passed an examination conducted by the Department of Registration and Education to determine his fitness to receive a certificate of registration as a registered embalmer.

A person is qualified to receive a certificate of registration as a registered apprentice:

- (a) Who is at least eighteen years of age;
- (b) Who is of good moral character and temperate habits;
- (c) Who has graduated from the eighth grade of a common school, approved by the Department of Registration and Education, or who has completed an equivalent course of study, as determined by an examination conducted by the Department of Registration and Education; and
- (d) Who has entered upon the study of embalming

under a registered embalmer, or who has indicated his intention of doing so. (Callaghan's 1920 Stat. P. 10624 (4).)''

The above quoted sections of the code and of the State law relating to embalmers make it clear that only *natural persons* can be legally licensed to conduct or manage an undertaking business. The facts set out in Case No. 2 therefore show a plain violation of the code which would not be relieved or overcome by the fact of a corporation to do an undertaking business. The facts stated do not indicate that any licensed undertaker manages or controls the business even as agent of the corporation.

Section 1906 of the Code is as follows:

“1906. *Persons in charge of or managing undertaking rooms.*) No person other than a licensed undertaker shall be permitted to manage or control any undertaking room, store, place or establishment, or to prepare dead bodies for burial or cremation, or to manage or conduct funerals in the capacity of an undertaker; provided, that when any person licensed as an undertaker hereunder shall desire to have any room, store, place or establishment in which he is licensed to conduct, operate or maintain an undertaking establishment, managed, conducted or operated for him by any agent, assistant, clerk or employe, he shall be permitted to do so upon making application to the commissioner of health for that purpose, setting out in such application the name and residence of the person whom he desires to have act for him as aforesaid, and upon his furnishing evidence satisfactory to said commissioner that such person is qualified to act as an undertaker and possesses the same qualifications as are required to be possessed by applicants for a license as an undertaker in and by the provisions of Section 1900 of this article. Upon receipt of such application, if the said commissioner shall be satisfied that such person is a fit person to conduct, manage or operate an undertaking establishment as an undertaker's assistant, he shall; upon payment by such applicant to the city collector of a fee of five dollars, issue or cause to be issued a certificate authorizing the person named in such application to act as an undertaker's assistant in charge of the room, store, place or establishment de-

scribed in such application for and during the term of the license held by such applicant."

This section makes clear the necessary conditions that apply to an agent *in charge of an undertaking room or place or taking part directly* in the management of the work of an undertaking establishment. However, we do not find anything in the code that prohibits an undertaker from employing other agents or servants merely to secure business or to give or receive information provided such agents or servants have no part in the management of an undertaking room and no direct part in the care of bodies, or of funerals or any other of the usual functions of an undertaker. The facts stated in Case No. 3 do not indicate that the barber has any part in the undertaking business or that the barber shop is directly associated with the undertaking room.

We are, therefore, of the opinion that said Section 1906 does not apply, and the facts stated do not show a violation of the code.

Very truly yours,

C. M. DOTY,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Necessity of Obtaining Releases When Sums of Money are Paid by the Beneficiary for the Vacation of a Street or Alley.

August 28, 1923.

HON. JAMES B. BOWLER, Commissioner of Compensation.

Dear Sir:

We have your communication of July 28, 1923, stating that in order to protect the City against suits for recovery of money paid for the vacation of streets and alleys under

vacation ordinance, your office has been obtaining the enclosed form of release signed by the beneficiary in each instance.

As your letter indicates, the last Legislature has amended the act on vacation of streets and alleys. This act was approved June 30, 1923, and is as follows:

“SECTION 1. That Sections 1 and 2 of an Act entitled ‘An Act to revise the law in relation to the vacation of streets and alleys,’ approved March 24, 1874, in force July 1, 1874, as amended, be amended to read as follows:

Section 1. Whenever the city council of any city, or the board of trustees of any village or town, whether incorporated by special act or under the general law, or the council of any city or village operating under the commission or managerial form of government, shall determine that public interests will be subserved by vacating any street or alley, or part thereof, within their jurisdiction, they may by ordinance vacate such street or alley, or part thereof; provided that any such ordinance shall be passed by the affirmative vote of at least three-fourths of the members of such city council or of such board of trustees or of such council, authorized by law to be elected; such vote to be taken by ayes and noes and entered on the records of such council or board. Such corporate authorities, in behalf of any such city, town or village, may in such case contract for and receive from the owner or owners of property abutting upon such street or alley, or part thereof, so vacated, compensation in an amount which in the judgment of such corporate authorities, shall be equal to the benefits which will accrue to the owner or owners of such abutting property by reason of such vacation. The validity of any such vacation shall not be questioned by reason of the payment of any such compensation, nor by reason of benefits specially accruing therefrom to the owner or owners of abutting property. The determination of such corporate authorities that the nature and extent of the public use or public interest to be subserved is such as to warrant the vacation of such street or alley, or part thereof, so vacated, shall be final and conclusive, and the passage of such ordinance shall be sufficient evidence of such determination, whether so recited in the ordinance or not. The relief to the public from further burden and

responsibility of maintaining such street or alley, or part thereof, so vacated, shall constitute a public use or public interest authorizing such vacation. When property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law.

Section 2. Except in cases where the deed, or other instrument, dedicating a street, alley or highway shall have expressly provided for a specific devolution of the title thereto upon the abandonment or vacation thereof, whenever any street, alley or highway or any part thereof shall be vacated under or by virtue of any Act of this State or by ordinance of the city council of any city, or board of trustees of any village or town, or council of any city or village operating under the commission or managerial form of government, or by the commissioners of highways, county board or other authority authorized to vacate the same, the title to the land included within such street, alley or highway, or part thereof, so vacated, shall vest in the then owner or owners of the lands abutting thereon, in the same proportions and to the same extent as though such street, alley or highway had been dedicated by a common law plat (as distinguished from a statutory plat) and as though the fee of such street, alley or highway had been acquired by such owner or owners as a part of the lands abutting on such street, alley or highway.

Approved June 30, 1923."

After perusing the above we formed the opinion that it will not be necessary in the future to seek signatures on this form of release or any other form. The statute has the effect that such release is not necessary so that the City can retain the money deposited for such vacation of a street or alley.

Yours truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Ordinance Requiring Two Washrooms in Every Restaurant.

September 17, 1923.

HON. FRANK J. TOMCZAK, Alderman 39th Ward.

Dear Sir:

In answer to your communication of September 7th with reference to the installation of two washrooms in every public dining room or restaurant in Chicago, and requesting our advice as to the City Council's authority to pass an ordinance of this nature, we beg leave to reply as follows:

The City by a recent Supreme Court decision was denied the right to regulate restaurants, and this precludes any interference with the proper conduct of that business.

Looking at the question from the standpoint of safeguarding public health, while we will all agree that the police power of the State extends to the protection of the health and comfort of its citizens, and that persons and property are subjected to all kinds of restraints and burdens in order to insure such protection, yet we feel in this instance that it would be unreasonable and extravagant to regard this proposed legislation as a health measure in connection with the operation of restaurants.

Yours truly,

EDMOND L. MULCAHY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Effect and Validity of Amendatory Act of 1923 Upon
Pensions Paid Under the Municipal Employees'
Annuity and Benefit Fund of Chicago.**

September 20, 1923.

MR. D. F. CAMPBELL,

Actuary Municipal Employees' Annuity and Benefit Fund
of Chicago.

Dear Sir:

I have your letter of September 1, 1923, requesting an opinion as to the amount of widow's annuity to be paid to the widow of James Kiernan, deceased, formerly P. R. 4202, whose salary on December 31, 1921, of \$250 a month, was decreased on the following day, viz., January 1, 1922, to \$232.50 per month.

You state that under Sections 14 and 37 of the Act of 1921 the annuity was computed on the salary paid to the employe on December 31, 1921, and that in 1923 the act was amended so that the annuity was required to be figured on a basis of the salary paid on January 1, 1922.

The amendatory Act of 1923 declares that the Act of 1921 "be and hereby is amended by amending sections * * * and by adding thereto three new sections, * * * the amended sections and added sections to read respectively as follows." The wording of the amendatory act is equivalent to a repeal of inconsistent portions of the original act.

Kepley v. People, 123 Ill. 367.

Palmer v. City of Danville, 166 Ill. 42.

This, of course, would not be true if the amendatory act were to interfere with any vested rights.

People v. Clark, 283 Ill. 221 (225).

There is, however, no vested right in a pension fund provided by State law.

Eddy v. Morgan, 216 Ill. 437 (449).

I am of the opinion that the amendatory act replaces the original act as to the new sections and the sections amended, and that the annuity will have to be based on the provisions of the amended Act of 1923.

Yours very truly,

FRANK M. PADDEN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Set-off of Claim of City Against Debt Due From City
to Same Corporation.**

September 21, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

This office is in receipt of a communication from you dated September 20, 1923, requesting an opinion as to the advisability of refusing to pay the Kettler Elliott Co., for certain work done by that company for the City, in view of the fact that the said company at present owes the City a considerable amount of money on a former claim.

Upon these facts we desire to advise you that we recommend that you do hold up this payment to the Kettler Elliott Company until an understanding has been reached with that company as to the exact amount which the City owes the said company or which the said company owes the City, taking into consideration all previous transactions and claims between the two. Since both the present and past transactions with the Kettler Elliott Company constitute debts between the said company and the City, any claim which the City

has against the said company may legally be set off against any claim which the company has against the City.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Petition of Majority of Aldermen for a
"Flower Day" Comes Within the Prohibition
of the Code Relative to Tag Days.**

Chicago, September 24, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your letter of recent date concerning proposed Flower Day for D. of Z. Orphan Infant Home.

You state therein that 27 aldermen have signed a petition, which is in your possession, giving their consent to the holding of such flower day in their respective wards on Monday, October 8, 1923; that you have the impression that the holding of a flower day is merely a subterfuge for a tag day; and asking to be advised whether, in the absence of "a regular council order," the petition is sufficient authority for you to allow the said flower day to be conducted.

The proposed flower day comes within the definition of a "tag day," as the same is set forth in Section 2765 of The Chicago Municipal Code of 1922. The code limits these tag days to three annually. Consequently the holding of such a tag day under the name of a "flower day" is contrary to the ordinances.

It will not be sufficient to overcome the force of the ordinance even if a council order is passed, since such an enactment will not be of equal dignity with the ordinance prohibiting such a tag day. In case the City Council meets before the day in question, and passes an ordinance authorizing it, which the Mayor will sign, a tag day on the date mentioned would be lawful, otherwise not.

It has been suggested that because the 27 aldermen have signed the petition some force should be given to it, since that constitutes a majority of the City Council. That cannot be viewed in that light, however, because in signing such a petition these aldermen are not acting at a session of the council, which is the only occasion at which they have the right to exercise the function of legislation for the municipality or its people. Neither can the proposed flower day be limited to the respective wards of the aldermen signing the petition, as is suggested in your letter.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Liability of Elevated Railway Companies to Pay the City Fees for the Cost of Inspection of Viaducts.

September 24, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Replying to your letter of May 9th, last, requesting an opinion from this office as to whether or not the elevated railway companies are liable to the City for the cost of struc-

tural iron inspection on repair and extension work done under permit from your department by the companies, we beg to report that this office is of the opinion that the companies are liable for the cost of inspection of only new or original construction, or in other words, for only such construction as might be classified as a capital improvement, and not for repairs or alterations, unless such alteration might be so classed.

The ordinance of May 15, 1893, granting authority to the Lake Street Elevated Railroad Company "to construct, maintain and operate" an elevated railroad, provides:

"Section 3. The said railroad and branches in this ordinance authorized shall be constructed under and subject to the inspection and supervision of the Commission of Public Works," etc. "And the cost and expense of such inspection shall be paid by the said railroad company."

The franchise ordinances authorizing the construction, maintenance and operation of the other elevated lines all provide in substance, concerning the matter of inspection and the cost thereof, the same as the ordinance quoted from, and, therefore, it will not be necessary to set them out here. In none of them is it provided that the companies shall be liable for the cost of inspection of anything more than "construction" and the only question presented by your inquiry is whether or not the word "construction" may be interpreted to mean a continuing process of original construction, maintenance, repair and alteration. We are of opinion that it may not.

The word "construct" is defined in the Century Dictionary to mean, "To put together in their proper place and order; erect; build; form," etc.

The adjudicated cases that we have found touching the question involved, with one or two exceptions, where the peculiar nature of the case seemed to warrant a departure from this conclusion, uniformly hold that the words "construction" or "erection" imply only original construction, or extraordinary repairs or alterations that amount to a capi-

tal improvement. *Commonwealth v. Hayden*, 211 Mass. 296; *Rand v. Mann*, 3 Phila. 429; *Appeal of Hancock*, 115 Pa. 1; *Perigo v. Van Horn*, 2 Miles (Pa.), 359; *Burke v. Brown*, 30 S. W. 936; *Grant v. Hartford, etc., R. Co.*, 93 N. S. 225; *State v. Miller*, 21 Okl. 448-455; *Moorhead v. R. R. Co.*, 17 Ohio, 340-353; *In re Hawett*, 10 Pa. 379; *Rynd v. Bakewell*, 87 Penn. St. R. 460; *Wetmore's Appeal*, 91 *Id.* 276; *Dresbach v. Keller*, 2 *Id.* 77; *Armstrong v. Ware*, 20 *Id.* 519.

The Pennsylvania cases cited were mechanics' lien cases brought under the Lien Act of 1836. That act gave mechanics and materialmen a lien for labor and materials furnished in or about the "erection or construction" of buildings. Later the act was amended to include alterations and repairs, but before the amendment, the Pennsylvania courts uniformly held that the words "erection or construction" meant only original construction and did not include alterations and repairs.

In *Hancock's Appeal*, 115 Pa. 1, the court said:

"It was repeatedly held that under the Act of 1836 a lien would not lie for repairs and alterations, unless as was subsequently held in *Dresbach v. Keller*, 2 Penn. St. R. 77, and in *Armstrong v. Ware*, 20 *Id.* 519, 'the structure of a building is so completely changed that, in common parlance, it may be properly called a new building or a rebuilding.' "

In *Commonwealth v. Hayden*, 211 Mass. 296, it appeared that defendant was convicted for the violation of an ordinance which provided that whenever a combustible roof covering was replaced, it should be replaced with a non-combustible covering to the satisfaction of an inspector. On appeal the validity of the ordinance was questioned. It was contended on behalf of the City that the ordinance was authorized by statute which provided that any city, for the prevention of fire may "regulate the inspection, materials, construction, alteration and use of buildings."

The court there said:

"The reshingling of a roof theretofore shingled does not come within the enumeration of purposes set forth

in this section of the statute. Reshingling is simply a repair of an existing structure. It is not a 'Construction.' This word in the connection in which it occurs means the erection of a new building or an addition to an old building."

In *Grant v. Hartford and New Haven Railroad Co.*, 93 U. S. 225, it was held that the expression "profits used in construction" did not embrace earnings expended in repairs for keeping the property up to its normal condition, but had reference to new construction adding to the permanent value of the capital.

It will be noted that in the ordinances under consideration the granting clauses used the words "construct, maintain and operate" and in the sections referring to inspection only the word "construction" was used.

We think, as was said in *Commonwealth v. Hayden* (*supra*):

"The omission of the word 'repair' from one section and its use in another of a single statute regulating the same subject usually cannot be regarded as devoid of significance."

Had the sections concerning inspection in the ordinances in question used the words "maintenance and operation" in connection with the word "construction," we think the companies would be liable for the cost of inspection of repair and alteration work as well as original construction, but with these words omitted we do not see how the cost of such inspection can legally be claimed by the City. Adopting the familiar rule of construction that an instrument is most strongly construed against the party drawing it, it seems to us that the City's position in the matter is clear. We do not think the ordinances may be regarded as public grants and, therefore, to be construed in favor of the City.

For the foregoing reasons, we are of opinion that the companies are liable for the cost of structural iron inspection only in cases of original construction or such ex-

traordinary alterations as may be classified as capital betterments.

Yours truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Restricting Public Parking in Front of Private Homes
Near Dance Halls, Theaters, Etc.**

September 24, 1923.

HON. GUY GUERNSEY, Alderman, Sixth Ward.

Dear Sir:

Your communication addressed to the Corporation Counsel, wherein you request to be advised as to the rights of property owners in your ward to obtain exclusive automobile parking privileges in front of their homes for themselves and guests as against the use thereof now made by non-residents attending dance halls, theatres, etc., located nearby, has been referred to me.

In reply I beg leave to say that the law is definitely established in this state that cities hold title to the streets for the use of the general public.

“The primary and paramount use of the streets is public travel for man and beast, and carriage of goods, and this use everyone enjoys upon terms of equality with others.”

28 Cyc. 907.

Among the powers delegated to the municipality by Section 1 of Article V of the Cities and Villages Act is contained the ninth clause which gives the right to the City to regulate the use of streets.

In pursuance of this authority, Section 3854 of The Chicago Municipal Code of 1922 was passed authorizing the Commissioner of Public Works upon Council order to establish non-parking spaces. The use of this section has been restricted, I am informed, to commercial districts. The propriety of extending its operation to residential districts in your ward is, however, a matter for your own decision.

You ask in your letter for a suggestion "as to the best way to give relief." Therefore, permit me to say that relief could best be obtained by the introduction of an ordinance establishing prohibited parking zones throughout the city wherever conditions similar to those in your ward exist.

Very truly yours,

EDMOND L. MULCAHY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Only One Cigarette License Required When Cigarettes
are Sold in Different Locations Within
the Same Premises.**

September 24, 1923.

HON. J. H. WILSON, Superintendent of License Department.

Dear Sir:

Your letter of June 27, 1923, requesting a legal opinion in regard to your practice of requiring the payment of one cigarette license fee only for one premises, even though cigarettes are sold in several locations within the premises, has been referred to me.

Section 971 of Article II, Chapter XII, of the Municipal Code of 1922 reads, in part, as follows:

“such license shall authorize the person, firm or corporation therein named to expose for sale, sell or offer for sale cigarettes, and cigarette papers and wrappers at the place designated therein.”

It seems to me that the answer to that question depends on the definition of the word “place.”

The courts have held that:

Place of business has been defined as:

“A place actually occupied either continually or at regular periods, by a person or his clerks or those in his employment” (employ).

Adam v. Musson, 37 Ill. App. 501.

“Place is a comprehensive term and may consist of one or more rooms or a building or it may be an entire building, or more than one building within the same place used together. * * *”

State v. Brown, 14 N. D. 529.

“The word place has a broad signification, and applies not only to a building, but also to any inclosure, whether covered or not.”

Brookline v. Hatch, 167 Mass. 380.

Therefore, in view of the foregoing definitions, I am of the opinion that the payment of one cigarette license fee for a premises is all that is required, provided, of course, that the cigarettes and cigarette papers and wrappers are sold by one person, firm or corporation or by their clerks or employees.

Yours truly,

MARTIN A. MELLOY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right of Park Commissioner to Make Agreement with City for Keeping of Prisoners.

September 25, 1923.

HON. DONALD S. MCKINLEY, Alderman 19th Ward.

Dear Sir:

This office is in receipt of your request for an opinion covering the right of park commissioners to make an agreement for the use of City or County institutions for the keeping of prisoners arrested for violating a park district ordinance.

In this connection we desire to call your attention to the following section of the Parks Act, Chapter 105, Section 377, of Cahill's Illinois Revised Statutes for 1923. Said section is as follows:

"377. Park board may agree with municipal authorities as to use of house of correction.) Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every board of public park commissioners in this State shall have full power and authority to enter into an agreement with the legislative authorities of any city, town or village in the county in which the park system under the control of such board of public park commissioners may be situated, or with any authorized officer thereof in behalf of such city, town or village which now has or which may hereafter have a house of correction, to receive and keep in said house of correction any person or persons who may be sentenced or committed thereto by any court in such county for the violation of any ordinance of said board of public park commissioners, or failure to pay the fine imposed for such violation. (J. & A., Par. 8243.)

378. *Commitments by court.)* Section 2. After such agreement shall have been entered into it shall be the duty of the court finding any person guilty of the violation of any ordinance of any such board of public park commissioners punishable by imprisonment to sentence the person so found guilty to such house of correc-

tion, and for the violation of any ordinance of such board of public park commissioners punishable by fine, it shall be the duty of the court to commit any person who shall not forthwith pay any fine so imposed by the said court, to the said house of correction, there to be received and kept for the time and in the manner prescribed by law, and subject to the discipline of said house of correction, and it shall be the further duty of said court by warrant of commitment duly issued to cause such person so sentenced or committed to be forthwith conveyed by some proper officer to said house of correction. (J. & A., Par. 8244.)

379. *Conveying and delivering of prisoners—Fees of officers.*) Section 3. It shall be the duty of the officer to whom such warrant of commitment is delivered to convey such person so sentenced or committed to the said house of correction, and there deliver such person to the keeper or other proper officer of said house of correction, whose duty it shall be to receive such person so sentenced or committed and to safely keep and employ such person for the term mentioned in the warrant of commitment, according to the laws of said house of correction; and the officer thus conveying and so delivering the person so sentenced or committed shall be allowed such fees, as compensation therefor, as are or shall be prescribed or allowed by law. (J. & A., Par. 8245.)

380. *Emergency.*) Section 4. WHEREAS, In some of the park systems in this State there is no authority for the making of the contract hereinbefore authorized, therefore an emergency is declared to exist, and this Act shall be in force from and after its passage. (J. & A., Par. 8246.)"

The above section gives the power to park commissioners to enter into agreement with either the City or the County for the housing of their prisoners. Upon investigation, however, the office of the City Comptroller reports that to their knowledge no such agreement has ever been entered into, but that in the past, offenders who have been arrested for the violation of a park ordinance have been housed in the bridge-well through comity but without any understanding, written or otherwise. While the above quoted statutes does not provide for payment to be made to the City or County by the park for the use of its jail, it seems only fair that since

the City or County is furnishing the jail, that a reasonable charge should be made for the use thereof.

In conclusion, then, we advise you that under the above quoted section of the statute, the Ridge Park District has the right to enter into an agreement with either the City of Chicago or the County of Cook for the use of the house of correction for the housing of park prisoners. Although the statute is silent as to the terms of such an agreement, it is only reasonable and fair that the City should be paid a reasonable compensation for such use, based either upon an annual rental or upon a per capita charge.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Procedure to Amend the Zoning Ordinance.

September 26, 1923.

HON. FRANK J. TOMCZAK, Alderman 39th Ward.

Dear Sir:

I beg to acknowledge receipt of your letter of September 24th requesting information as to the procedure in the amending of the Zoning Ordinance.

Under Section 4 of an act passed by the last general assembly, which took effect July 1, 1923, it is provided that the Zoning Ordinance may be amended only by ordinance, and that no such amendment shall be made without a hearing before some commission or committee designated by the City Council. At least fifteen days' notice of the time and place of such hearing shall be published in an official paper or a

paper of general circulation in the City. In case of written protest against any proposed amendment, signed and acknowledged by owners of twenty per cent of the frontage proposed to be altered or by the owners of twenty per cent of the frontage immediately adjoining or across an alley therefrom, or by the owners of twenty per cent of the frontage directly opposite the frontage, proposed to be altered, filed with the city clerk of the City, such amendment shall not be passed except by the favorable vote of two-thirds of all the members of the City Council.

Trusting that the above will give you the information you desire, I am

Yours very truly,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of City to Rescind Contract For Sale of the City's Junk.

September 26, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You forwarded to us your copy of the contract entered into on behalf of the City with Max Wexelman, whereby the latter was to purchase approximately 950 tons of steel scrap from the old Roosevelt road viaduct at a certain stipulated price. The contract provides, among other things, that certain amounts of money should be deposited with the City from time to time to cover purchases.

It appears from your letter that there was deposited a total of \$10,000, that scrap amounting to \$7,999.78 was de-

livered to the contractor, and that there remains \$2,000.22 of this amount in the hands of the City. Meanwhile differences and disputes having arisen, it was proposed, in settlement of all misunderstandings, that the sum so on hand in this deposit be returned to the contractor, and that the City and the contractor should execute mutual releases. An agreement to this effect was drawn up, signed by the Commissioner of Public Works on behalf of the City and by the contractor, the form having been approved by this department. This contract of release or rescission was forwarded to you for the purpose of obtaining your counter-signature and the approval of the Mayor. You state that you are in doubt as to the legality of the second contract, and you ask for a written opinion as to whether the Commissioner of Public Works can abrogate an uncompleted contract entered into by order of the City Council and whether the Comptroller would be justified in refunding the unused deposit.

We recommend that this matter be held in abeyance until the City Council can give authority to abrogate the contract. Our reasons for making this recommendation are as follows:

There has always been some check on the disposition by sale of property belonging to the City. The method prescribed by statute up to a few years ago for the sale of personal property was practically the same as for the sale of real estate, and was very slow and cumbersome. It was so troublesome that we prepared a bill for a new act which was passed by the Legislature in 1917 (See Hurd's Rev. St., Ch. 24, Secs. 378-380-b.)

The law at present makes the following provision in regard to the sale of personal property:

“Whenever any city or village incorporated under any general or special law of this State shall own any personal property which, in the opinion of three-fourths of the members of the city council of any such city or of the board of trustees of any such village, shall be no longer necessary or useful to, or its longer retention be for the best interests of such city or village, such majority of such city council or board of trustees may, at any regular meeting or at any special meeting

called for such purpose, by ordinance authorize the sale of such personal property in such manner as it may designate, with or without advertising the same. * * *

By reference to the action of the City Council on this matter, we find that an order was passed on April 5, 1923 (Journal, p. 2350), under which the Commissioner of Public Works was authorized to make the contract with Wexelman.

It may be contended that there are certain formalities required by law which were not observed, but the fact remains that the Commissioner of Public Works acted on this authority, and the City entered into the contract. Such being the case, it is the duty of the City's officers to endeavor to have the contract carried out, and no one has the authority to abrogate it without action on the part of the City of Chicago.

Under its power "to control the finances and property of the corporation" (Clause 1, Sec. 1, Art. V, Cities and Villages Act), the City Council has not the right to discharge a debt without payment, but it may settle a controversy where matters are in dispute.

Agnew v. Brall, 124 Ill. 312.

If the disputes and differences which have arisen on this contract are of such a nature that there is a controversy over what would be due thereunder, there is no doubt of the right of the City Council to authorize such a settlement as is proposed. But no such power of making settlement of a disputed claim or controversy over a contract is lodged in any executive officer of the City.

We therefore suggest, as stated above, that the matter be referred to the City Council, with a recommendation from the Commissioner of Public Works.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

When Promotional Examinations Must be Held Under the Civil Service Law.

October 2, 1923.

MR. WILLIAM F. FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

Your letter of October 1st in regard to eligible list for position of Assistant City Engineer is received.

As I understand it, this was an original entrance examination. I am also informed that there were "members of the next lower rank" eligible to take a promotional examination for this position.

Section 9 of the Civil Service Act, as construed by our Supreme Court in the *Errant* case, requires that vacancies shall be filled by promotion wherever it is "possible" to do so. I am of the opinion therefore that if there were any members of the next lower rank or grade who desired to take an examination for a vacancy in the office of the Assistant City Engineer, the holding of an original examination would be in violation of Section 9 of the Civil Service Law.

Very truly yours,

FRANCIS X. BUSCH,

Corporation Counsel.

Power and Authority of Illinois Commerce Commission to Require Gas Co. to Lay Pipes in City Streets—Power of City Over Streets.

October 3, 1923.

HON. EDWARD J. GLACKIN, Secretary, Board of Local Improvements.

Dear Sir:

Your letter of May 26th last, addressed to Mr. Philip McKenna, attorney, Board of Local Improvements, request-

ing an opinion as to "whether or not the Illinois Commerce Commission can compel the Gas Company to put in gas pipes and service pipes before the street is paved," has been referred to this office.

We beg to advise that we are of the opinion that the Commerce Commission is without authority or jurisdiction to enter the order mentioned. By Section 1 of Article 5 of the Cities and Villages Act, express authority is delegated to the City "to regulate the use" of streets, alleys, etc., and unless the supervisory powers of the Commerce Commission may be said to imply an authority superseding the delegation of that duty to the City, and thus in effect repeal that portion of the Cities and Villages Act, we do not see how your question can be answered other than in the negative.

The Commerce Commission is invested with the duty of "general supervision" over public utility companies and the conduct of their business as such and not over public streets, alleys, etc., and we think the general supervision of such companies includes neither the power nor the duty to regulate the use of the public streets. We find nothing in the act creating the Commerce Commission that is at all inconsistent with the power delegated to the City, and consequently we are of the opinion that the right and power of the City in that regard remain unimpaired. It is true that the State is primarily invested with the general control and supervision of public streets and highways, but it has delegated that authority to the City, and while such delegation is subject to revocation at any time, nevertheless we are not aware that it has ever been so revoked.

The question your communication presents has been before the Commerce Commission on two different occasions that we know of, and both times the Commission has declined to interfere with the municipalities involved in the regulation of the use of the streets.

In re Chicago and West Towns Railway Co., P. U. R. 1919 A. 685, the Commission said: "By agreement of parties, the question of ordinance paving requirements was pre-

sented for the consideration of the Commission. It appears that the City of Berwyn has contracted to pave certain streets in which are located the tracks of the Chicago and West Towns Railway Co. The franchise ordinance requires the railway company to pave its portion of the streets when the City paves. The company has not complied. On this question the Commission has taken the position that the enforcement of paving provisions of franchise ordinances is a matter that does not come within its jurisdiction, unless it is shown that conditions affect the safety of the operation of the cars."

And in *Orvis v. Chicago and Milwaukee Electric Railroad Co.*, Volume 2, Opinions and Orders, Ill. Public Utilities Commission 84, it was said (p. 85): "The foregoing disposes of all complaints in the petition with the exception of No. 5 above, which relates to the neglect of the railway company to maintain the streets in which its north and south track runs in Waukegan in such a manner as to seriously interfere with the public use of the streets other than electric railway transportation. The maintenance of a street in a passable condition for traffic is one which addresses itself primarily to the municipal authorities. The Commission, therefore, is not disposed to take jurisdiction of that matter."

There is ample authority for the above conclusion, but we assume that your board is interested only in the conclusion and not in an academic discussion as to how that conclusion was reached, and we therefore refrain from any analysis of the authorities relied upon. We are clear, therefore, that desirable as the order you seek may be, the Commission is without authority to make it.

We think, however, that the ordinance granting authority to the Gas Company to open streets and alleys for the purpose of laying its mains and service pipes contains a sufficient reservation of power in the City to legislate further on the subject in such wise as to justify an ordinance imposing the conditions and restrictions sought. And even were this not the fact, we are clear that the right to regulate the use of the streets is a legislative or governmental function,

which the City may not contract or barter away, and that even independently of the reservation contained in the franchise ordinance the City Council might pass an ordinance or resolution correcting the condition complained of.

If the Board of Local Improvements is interested in pursuing the matter further along the lines suggested, we shall be very glad to co-operate with the Board or its attorney, and render every assistance possible.

Very truly yours,

JAMES J. COUGHLIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Licenses Issued on Checks on Which Payment Has Been Stopped.

October 4, 1923.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

Your letter concerning the issuance of licenses which were to be and some of which were actually taken out on September first was referred to the writer for consideration and reply.

It appears that when the newspapers published the list of occupations which were licensed without authority under the statute, there were a number of licenses issued by you in response to applications accompanied by checks on which payment was subsequently stopped. This put your office in the position of having issued the licenses without receiving pay for same.

You understand, of course, that up to the present time no action has been taken by the City Council concerning these invalid license ordinances.

The administration, through the Mayor and others, has indicated that it would not follow a policy of trying to hold on to the ordinances when there was no chance of enforcing them; but the ordinances are still on the books. Hence, anyone who sends in money for a license is in the attitude of having voluntarily paid a tax, and he cannot recover the payment even though the tax is invalid.

In the case of those parties who stopped payment on their checks, care should be exercised in determining whether or not they come within the class from whom we cannot hope to collect a license fee. If they are in the list of those from whom no fee can be collected they should be required to return the license for cancellation so that the charge for same may be taken off the books. In all other cases the license fee should be paid, and if not paid immediate steps should be taken to prosecute. We suggest this because there are many persons who seem to think that all license fees are suspended.

We have no doubt that the City Council will repeal the unenforceable ordinances when it begins its sessions this fall, and then the situation will be clarified.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Whether City May Recover for Value of Hydrant When Street is Vacated.

October 4, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of the 25th ultimo in which you ask to be "advised if the City is entitled to recover the present value of the water main and hydrant and the cost of disconnecting same on a strip of land north of

Redfield street and east of Elston avenue known as Stein street."

The ordinance vacating the above mentioned strip of land is as follows:

"Be it Ordained by the City Council of the City of Chicago:

Section 1. That the whole of Stein street in the City of Chicago, and all of that portion of the fifteen-foot alley running northwest and northeast in Stein and Hirsh's Subdivision of Lots seven (7) to twelve (12) (both inclusive) in Block seventeen (17) in Sheffield's Addition to Chicago, Cook County, Illinois, which lies in the rear and adjoining Lots one (1), two (2), three (3), four (4), five (5), eleven (11), twelve (12), thirteen (13), fourteen (14) and fifteen (15) in said Stein and Hirsh's Subdivision, as laid out and shown upon the map thereof recorded in the Recorder's office of Cook County, in the State of Illinois, January 16, 1868, in Book 166 of Maps, on page 7, be and the same are, and each of them is, hereby vacated and closed: provided, however, that this ordinance shall not take effect until the Gates Iron Company shall have paid to the City Comptroller of the City of Chicago, the sum of one thousand seven hundred and fifty (\$1,750.00) dollars; and provided, further, that said sum of \$1,750.00 shall be paid by said company to the City Comptroller within thirty (30) days from the date of the passage of this ordinance, otherwise this ordinance shall be of no effect and void.

Section 2. This ordinance shall be in force and effect from and after its passage."

As the foregoing ordinance is silent on the question of the value of the water main, hydrant and the cost of disconnecting same, and as there isn't any privity of contract between the City of Chicago, Gates Iron Co., and Hanna Engineering Works, we are of the opinion that the City is not entitled to recover the present value of the water main and hydrant and the cost of disconnecting same.

Yours very truly,

THOS. W. FLYNN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of City to Stop the Appearance on the Stage of
Person Notorious on Account of Having
Committed a Criminal Act.**

October 6, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police:

Dear Sir:

Replying to your letter of October 6, 1923, relating to the proposed exhibition of one Fred Thompson as an attraction at the Rialto Theater in this city, we are of the opinion that said exhibition would constitute a clear violation of the Criminal Code of Illinois as contained in Paragraph 501 of Cahill's Revised Statutes of 1921, said paragraph reading as follows:

"That it shall be unlawful for any person or persons, company, firm or corporation to publicly exhibit for pecuniary gain persons who have become conspicuous through some criminal act, which has a tendency to degrade human morals, to exhibit their pictures or any article which appertains to them in their attainment of criminal notoriety, and to exhibit persons whose deformity is such as to attract public curiosity."

The penalty for violation of the above provision is a fine of not less than one hundred dollars or imprisonment in the County jail for not less than thirty, nor more than ninety days, or both such fine and imprisonment.

While this section has never been passed upon by the Supreme Court, we are of the opinion that it was framed to include just this class of cases. The language of the act is not restricted to the exhibition of convicted criminals, nor to the exhibition of actual deformities. Rather, the gist of the offense consists in exposing for gain, any person who has attained notoriety in connection with a criminal act, or whose deformities make him an object of morbid curiosity. If, therefore, the owners or managers of said theater, being noti-

fied that the exhibition of said Thompson will constitute a criminal act, shall ignore that notice and the exhibition is had, we are of the opinion that you may proceed to arrest under the above section any and all persons concerned in such exhibition.

Very truly yours,

M. C. DOTY,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Proceeds of General Corporate Bonds Unlawfully Used for Water Fund Purposes.

October 9, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You turned over to us some correspondence relating to the use of \$1,425,725.14 derived from the sale of general corporate bonds in the year 1908. This sum was spent for supplies and contract work for the Bureau of Water which should properly have been paid from the Water Fund.

The correspondence consists of a copy of a letter from the Comptroller to the Corporation Counsel dated December 22, 1917, a memorandum for the Deputy Comptroller dated March 25, 1918, and signed by the Chief Clerk of the Comptroller's office, an opinion of the Corporation Counsel dated April 3, 1918, and a letter from the Chief Clerk to the Comptroller dated August 3, 1923. There is no recent letter addressed to the Corporation Counsel, and we assume from this that the purpose of turning over these papers to us is to check up on our opinion of April 3, 1918, in order to determine whether we wish to stand by it.

Under the opinion referred to the Law Department held that the said sum of \$1,425,725.14 was due from the Water Fund to the General Corporate Fund, and that it could prop-

erly be returned to the fund to which it belonged without any Council action, but that owing to the lapse of time it would be advisable to submit the matter to the City Council in order that the proposed transfer might become a matter of record in the Journal of the City Council.

After careful examination of the file submitted we see no reason whatever for receding from the position which this department took in the opinion above mentioned. It is subject only to a correction as to the date of one of the bond ordinances mentioned therein. The letter of the Comptroller dated December 22, 1917, which asked for the opinion, merely said that the money was taken from general corporate bond issues amounting to \$3,500,000 and did not state what two issues of bonds the money had been taken from. Our inquiry at that time indicated that it had been taken from the bond issues of September 12, 1907 (Council Journal, p. 1565), and March 23, 1908 (Council Journal, p. 4591): The memorandum of the Chief Clerk (which we did not see before) says that the money was taken from the issue of March 23, 1908, and the issue of June 22, 1908 (Council Journal, p. 629). Since the last mentioned issue, however, is for the same purpose, viz., public improvements and general corporate purposes, the fact that we mistook one of the issues makes no difference, and we will stand by the opinion which we wrote before in which we recommended that immediate steps be taken to have the money returned to its proper fund.

In order to be sure that no mistake will be made if our recommendation is followed, the writer personally examined the books of the Treasurer and the vouchers drawn for water fund purposes. What could be ascertained from the personal recollection of city hall employees was also obtained.

So far as we are able to ascertain, the reason why bonds issued for the purpose of "providing the necessary funds wherewith to make public improvements and for the general corporate purposes of the City of Chicago" were used for water fund purposes was because there had been a theory entertained for a long time by the Commissioner of Public

Works, which finally found root in the Comptroller's office, that any liability incurred for the water system was a general corporate liability, and hence that it could be met out of general corporate funds.

We believe our former opinion sufficiently discusses this proposition, and we need not express any further views on the point. If that was the case there would be no further occasion for keeping the funds separate. Not only is this not the law, but there seems to have been good advice on the subject at the time. We are informed that it was the desire of the Comptroller and Commissioner of Public Works to place the proceeds of the bonds in question right into the Water Fund, but the Treasurer was advised by his counsel, the late John C. Richberg, that he should not do this but might meet the difficulty by opening up a new account under the caption of "Proceeds of Bonds Undistributed." It appears further that the Treasurer undertook to avoid any responsibility for the misappropriation of the fund by keeping such account of the fund that it showed what part was used for water purposes and what part was used for general corporate purposes.

An analysis of the said account discloses the following facts:

On April 3, 1908, the sum of \$1,000,000 was deposited into this fund, which (together with \$28,127 premium also deposited) came from the proceeds of the bond issue of March 23, 1908. Later there were added items of interest which we need not detail. On July 21, 1908, there was added an item of \$997,522.23, being the proceeds of the bond issue of June 22, 1908. There were also additional interest items after that. The amount paid out for Water Fund items as shown by the Treasurer's books was \$1,441,444.24.

This last mentioned sum, it would seem to us, should have been the amount charged up against the Water Fund as having been taken out of the general corporate fund, since the proceeds of these bonds, issued for the purpose of completing and making public improvements and for general

corporate purposes, could properly have been placed into the general corporate fund. By a bookkeeping adjustment, the reason for which is not apparent, this amount was changed to \$1,425,725.14.

To leave this sum permanently in the Water Fund would amount to a violation of the law, in that the bonds were issued for one purpose and the proceeds were used for another purpose. It is true, the bond issues were in the control of the City Council because the provision for submitting such issue to the people for approval was not yet adopted, but there was at least a technical violation of the law because the City Council took no action authorizing such a diversion.

In the course of the writer's investigation it was suggested that the Water Fund paid the interest on these bonds up to 1913, and that this was another reason for assuming that the Water Fund should ultimately become liable for the amount. Be this as it may we have given sufficient reasons for our opinion, and we again call attention to the inconsistency of issuing Water Certificates concurrently with the issuance of these bonds.

In order to bring this matter into such condition that proper action may be taken thereon we have prepared a draft of an ordinance providing for the transfer of the money from the Water Fund to the General Corporate Fund, reciting in a preamble to same the cause for taking such action.

We submit said draft herewith. If you deem it proper it can be presented to the City Council with your recommendation. We also return herewith the documents mentioned at the beginning of this letter.

It may be well to state to the City Council that this matter has had attention from the Law Department several times and that the Law Department has made a recommendation. We leave this to your judgment, however.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Power of City to License Restaurants.

October 9, 1923.

HON. JOSEPH O. KOSTNER, Chairman, Commission on Revenue.

Dear Sir:

You state in your letter of the 6th inst. that the Commission on Revenue desires information concerning the right of the City to pass ordinances regulating the operation of restaurants and licensing them for that purpose.

It would seem that the Supreme Court, by a decision of four to three, dispelled the last hope of controlling restaurants in this way.

In the case of *Potson v. City of Chicago*, 384 Ill. 222, involving what is known as the Colosimo restaurant, the question of the authority of the City under its present powers was squarely presented to the court. It was urged on behalf of the City that such power was granted under a combination of clauses of Section 1 of Article V of the Cities and Villages Act which authorized the regulation of ordinances (41), the regulation of the sale of meats, poultry and other provisions (50), the regulation of the inspection of meats, poultry, etc. (53), the taxing, licensing and regulating of coffee houses (91), and the general police clause (66).

The Supreme Court held that the powers so granted could not be construed as including the power to regulate or license restaurants. In passing on the question the court did not say anything about an interpretation of the words "coffee houses," but it held that the word "ordinary" could not be regarded as including a restaurant. With regard to the general police and health clause the court said:

"General authority is given to regulate the police, to pass and enforce all necessary police ordinances, and to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease, and these general powers may be called into exercise to make effective the powers

expressly given, but they are limited to that object. The General Assembly has not given to a city or a village any power to require a license of the keeper of a restaurant, and for want of such power the ordinance was null and void."

Potson v. City of Chicago, 304 Ill. 222-228.

The only chance of making an ordinance stand in the face of this decision is to prepare one that puts restaurants into a class of coffee houses. Even then it would hang on a very slender thread, and it might even endanger our present coffee house ordinance by narrowing down the meaning of the term so that many which we now license might not be included therein. It would seem as though there was no attempt made to invoke the health clause in the *Potson* case, and may be a chance of modifying the attitude of the Supreme Court on account of such omission in some future case.

Our recommendation, therefore, is that no attempt be made at present to license restaurants except in so far as they may be included within the present coffee house ordinance or one similar to it.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Illegal to Use Streets for Purposes of Street Carnivals Etc.

October 10, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

I have noticed that you have been quoted in the newspapers as expressing yourself to be unfavorable to the issu-

ance of permits for street fairs, dances or carnivals. It might interest you to know that although it has long been the custom for the Commissioner of Public Works to issue permits for such occasions, nevertheless the Supreme Court has held that the City, or the Commissioner of Public Works acting for the City, has no power to authorize the use of the streets for such purpose.

Thus in the case of *Van Cleef v. City of Chicago*, 340 Ill. 318, our Supreme Court, at page 324, said:

“And there is and can be no dispute of the propositions that the City had no power to authorize the use of the street for the carnival and street fair; that the occupancy of the street for that purpose was unlawful and the tent and platform a nuisance *per se*.”

The Appellate Court has reiterated this same principle in the case of *St. John v. President and Trustees of North Utica*, 157 Ill. App. 504.

Therefore, it would seem that your present policy is not only supported by sound wisdom but by the law as well.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Payment of War Tax on Purchase of Automobile for Fire Department.

October 11, 1923.

HON. JAMES BUCKLEY, Fire Marshal,

HON. ROSS D. WOODHULL, Chairman, Committee on Finance.

Gentlemen:

We have been requested to advise you with reference to the claim under a contract of H. Paulman & Company with

the City for war tax of \$273.88 brought about by the purchase of a seven passenger Pierce-Arrow touring car.

We find that the Fire Marshal signed an order form of contract under date of August 20, 1919, on which form the following provision appears:

“This order is offered subject to the approval and acceptance of the Pierce-Arrow Motor Car Company, Buffalo, N. Y., *and shall not be binding until so approved and accepted.*”

This therefore did not constitute a complete acceptance on the part of the Pierce-Arrow Motor Car Company.

Under the same date, August 20, 1919, the Fire Marshal wrote a letter to the Pierce-Arrow Motor Car Company's agents, H. Paulman & Company (which no doubt was signed when the order was signed), an excerpt of which appears below:

“A reply to this letter, giving date of delivery of car to this department and price prevailing so that I may be able to have the *necessary* council authority granted in November authorizing that payment be made for said car, will be greatly appreciated.”

Each party therefore entered into this transaction with reservations, and the Pierce-Arrow Motor Car Company cannot deny that notice was given them of necessary council action being required to complete the City's acceptance.

A completed contract cannot therefore be presumed to have been made on August 20, 1919, and an uncompleted contract is no contract at all.

Under existing ordinances by which departments are governed, every contract in excess of \$500 must first be approved and authorized by the City Council before the City becomes legally bound thereunder. Until this is done, such purchase is not only simply unauthorized, as made without authority, but is void because made in direct contravention of the City charter and ordinance, and therefore, prohibited to be made.

Section 13 of Article III of the Cities and Villages Act provides:

“The yeas and nays shall be taken upon the passage of all ordinances, *and on all propositions to create any liability against the City*, or for the expenditures or appropriation of its money and in all other cases at the request of any member, which shall be entered on the journal of its proceedings and the concurrence of a majority of all the members elected in the City Council shall be necessary for the passage of any such ordinance or proposition. * * *

Section 882 of the Chicago Code of 1911 grants the necessary power to the Fire Marshal to award and execute contracts wherein the cost exceeds \$500, in the same manner as is provided for the letting of similar contracts by the department of public works, in the same Code under Section 2104:

“Contracts—how made.) All contracts, when the expense thereof shall exceed the sum of five hundred dollars, shall be let to the lowest responsible bidder, after advertising the same for at least ten consecutive business days, except as may be otherwise provided by law, and shall be approved by the mayor; but any such contract may be entered into by the Commissioner of Public Works without advertising for bids and without such approval, by a vote of two-thirds of all the aldermen elected. No contract shall be made relating to any of the matters within cognizance of the department of public works unless the same shall have been authorized by the City Council. * * *

Pursuant to such authority the City Council on December 29, 1919 (C. P., page 1658), passed the following order:

“*Ordered*, that the Fire Marshal be and he is hereby authorized in accordance with his request of December 2, 1919, to purchase one (1) 7-passenger ‘Pierce Arrow’ touring car for the sum of seven thousand two hundred and fifty (\$7,250.00) dollars, less an allowance of five hundred (\$500.00) dollars for the old ‘Pierce-Arrow’ car—net, six thousand seven hundred and fifty (\$6,750.00) dollars; and the City Comptroller and City Treasurer are authorized to pay for same.”

Subsequently, the Fire Marshall decided to retain the old “Pierce-Arrow” car, to which the Paulman Company agreed, and on December 14, 1921 (C. O., page 1470); an amendatory

order was passed by the City Council authorizing the City Comptroller and City Treasurer to pass a voucher for \$7,250.

The City Council entirely disregarded the war tax feature of the transaction, and properly so, for the reason the City is exempt from payment of war tax, and further, because its dealings with the Paulman Company never included any war tax provision.

The Paulman Company, however, relies upon the contract wherein \$273.88 was added to the contract price, as tax. Such unauthorized and illegal action does not bind the City.

In Abbott on Municipal Corporations, Vol. 1, Sec. 277, we find:

*“Contracts made by Departments: * * * Contracts made by them affecting expenditures of other departments of government, or questions over which they have no control or a questionable one are not valid and binding. * * *”*

There is no question that the Fire Marshal could not by his own initiative waive a benefit conferred upon the City by Federal enactment, merely because it works a hardship on the company.

The City Council, in approving the purchase, appropriated an amount sufficient for the payment of the car only, thereby enforcing the valid part and eliminating the void part of the contract.

We are of the opinion, therefore, that the City should not assume this tax because it is bound by law not to, and further, because the contract was not binding until approved and authorized by Council action, and the claimant, even if notice was not given, is charged with knowledge thereof when dealing with municipal corporations.

Very truly yours,

JAY A. SCHILLER,

Approved: Assistant Corporation Counsel.

FRANCIS X. BUSCH,
Corporation Counsel.

**Status As to Forfeiture of Rights of Chicago Surface
Lines Under the "Settlement Ordinances"
of 1907 and the "Unification Ordinance" of 1923.**

October 17, 1923.

HON. WILLIAM E. DEVER, Mayor of Chicago.

We submit our opinion in the above matter, which we will discuss under the following heads:

I. The pending forfeiture suit and the forfeiture ordinance.

II. Erroneous claims of benefits to the City from institution of the suit and passage of the ordinance.

III. Disadvantages to the City which have resulted from such policy.

IV. Recommendations.

I.

THE PENDING FORFEITURE SUIT AND THE FORFEITURE
ORDINANCE.

We first respectfully beg leave to call your attention to the pending suit of City of Chicago versus Chicago Railways Company, *et al.*, No. B-57959, and to certain facts in connection therewith:

This suit has been commonly referred to as the FORFEITURE SUIT (of the Chicago Surface Lines Ordinances) and was filed in the Circuit Court, November 15, 1919.

A motion for a preliminary injunction to restrain the companies from charging a fare in excess of five cents was made on November 20, 1919, and denied January 22, 1920. Although pending for nearly four years, the case has never been put at issue, the questions involved have never been con-

sidered and there has been no judicial determination of the merits of the litigation.

While this suit has been commonly referred to as a suit for the FORFEITURE of the rights and privileges of the companies under the settlement and unification ordinances of 1907 and 1913, the relief which the City sought in the bill was *first* for specific performance of these ordinances (and the setting aside of the order of the Public Utilities Commission authorizing the seven cent fare) and *only in the alternative* for their FORFEITURE.

The prayer of the bill is:

“That each of said contracts” (referring to the settlement and unification ordinances) “between orator and the defendants be held and adjudicated to be valid and binding upon the defendant or defendants with whom the same was made in its entirety including its provisions prescribing the rates of fare to be charged by said defendants * * *; that in any event each of said contracts be held and adjudicated to be valid and binding in the matter of rates insofar as such rates are needed or intended to produce revenue or earnings for the company with whom such contract is made and not to enable said company to render service to the public and that said Public Utilities Commission has no right, power or authority to change or modify or to authorize such company to change or modify said contract in that regard; THAT IN THE ALTERNATIVE, IF SAID CONTRACTS SHOULD BE HELD AND ADJUDICATED TO BE NOT VALID AND BINDING IN THE MATTER OF RATES OF FARE, then that said contracts and each of them be held and adjudicated to be canceled, rescinded and set aside in their entirety and that the rights of the defendants and each of them in the streets of orator under said contracts be held and adjudicated to be terminated and at an end and that the defendants and each of them be held and declared to be mere tenants at sufferance in said streets; that the said judgment of the Circuit Court of Sangamon County” (referring to the judgment of that court setting aside the order of the Public Utilities Commission establishing a seven cent fare), “be held and adjudicated to be self-executing and to be in full force and effect, notwithstanding the appeal of the defendants therefrom

to the Supreme Court of Illinois; that it be held and adjudicated that the order of said Public Utilities Commission, entered on the 6th day of August, 1919, allowing the defendants to increase their rates of fare from five cents, in the case of persons twelve years of age or over, to seven cents, and from three cents in the case of persons under twelve years of age, to four cents, has been set aside and is no longer in force and effect and that the defendants are collecting said increased fares without warrant or authority of law"; etc.

We shall discuss both aspects of the bill, taking up first its effect as praying for specific performance, and, second, as praying in the alternative for FORFEITURE.

A. IN OUR OPINION, THE SUIT, IN SO FAR AS IT SEEKS TO COMPEL SPECIFIC PERFORMANCE OF THE PROVISIONS OF THE ORDINANCES FIXING RATES OF FARE AND TO SET ASIDE THE ORDER OF THE PUBLIC UTILITIES COMMISSION ESTABLISHING A HIGHER RATE OF FARE, CANNOT BE SUCCESSFULLY MAINTAINED FOR THE FOLLOWING REASONS:

First: *The Circuit Court of Cook County was without jurisdiction to hear and determine the suit.*

The bill was filed November 15, 1919. Before that date the Circuit Court of Sangamon County had taken jurisdiction of the controversy on the appeal of the City from the same order of the Public Utilities Commission, and an appeal from the judgment of that court was pending in the Supreme Court of Illinois at the time when this bill was filed in the Circuit Court of Cook County.

The jurisdiction of the Sangamon County Circuit Court to entertain an appeal to set aside an order of the Public Utilities Commission at that time was exclusive and the Circuit Court of Cook County had no jurisdiction to entertain such a bill.

By the terms of the Public Utilities Act, approved June 30, 1913, in force January 1, 1914, as amended by the Act of June 29, 1917, in force July 1, 1917, Section 68, Hurd's Revised Statutes (1919), page 2352, it was expressly provided that an appeal from an order of the Commission may

be prosecuted "to the Circuit Court of Sangamon County for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined."

The validity of this provision was sustained in the following cases:

State Public Utilities Commission v. Chicago & West Towns Railways Co., 275 Ill. 555.

State Public Utilities Commission v. A. T. & S. F. Ry. Co., 278 Ill., 58.

The next section of the Act (Section 69) provides that appeals from all final orders and judgments entered by the Circuit Court of Sangamon County in such matters may be taken directly to the Supreme Court of Illinois. It is unnecessary to cite authorities to the effect that the Circuit Court of Cook County, while the above statute was in effect, could not entertain a collateral proceeding to review or set aside an order by the Public Utilities Commission or to interfere with or in any way to affect the appeal prosecuted therefrom in regular course to the Sangamon County Circuit Court and from that court to the Supreme Court of the State.

Second: *Three months after the filing of this suit, the Supreme Court of Illinois affirmed the particular order of the Public Utilities Commission which this bill attacks, in the case of Chicago Railways Co. et al. v. City of Chicago*, 292 Ill., 190 (decided February 18, 1920).

The Supreme Court of the United States denied a writ of error to review this judgment of the Supreme Court of Illinois, thus affirming said judgment.

City of Chicago v. Chicago Railways Co., et al., 257 U. S. 617 (decided November 21, 1921).

It has therefore been finally determined by the highest tribunals of the State of Illinois and of the United States that the order of the Public Utilities Commission attacked in this bill was lawful and binding.

Our conclusion is that it would be useless to prosecute this suit for the purpose of obtaining any relief by way of specific performance of these particular provisions of the settlement and unification ordinances.

B. IN OUR OPINION, THIS SUIT, IN SO FAR AS IT SEEKS A FORFEITURE OF THE RIGHTS OF THE COMPANIES, CANNOT BE SUCCESSFULLY MAINTAINED.

First: *A proceeding brought to accomplish a forfeiture must be based upon clear and unmistakable rights.*

City of Belleville v. Railway Co., 152 Ill., 171.

Blocki v. People, 220 Ill., 444.

People v. Central Union Telephone Co., 232 Ill. 260.

Kern River Co., et al., v. U. S., 257 U. S. 147.

Farnsworth v. Minnesota Railroad Co., 92 U. S. 49 (23 Lawyers' Edition, 530).

Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25.

Wheeling, Etc., R. R. Co. v. Triadelphia, 58 W. Va. 487.

Union Street Railway Co. v. Snow, 113 Mich. 694.

Pacific R. R. Co. v. Leavenworth, 1 Dill. 393.

Whiting v. Village of New Baltimore, 127 Mich. 66.

City of Detroit v. Peoples Telephone Co., 135 Mich. 696.

People v. Broadway R. R. Co. of Brooklyn, 126 N. Y. 29.

City of Tower v. Tower & Soudan Ry. Co., 68 Minn. 500; 38 L. R. A. 541.

Palestine Water & Power Co. v. Palestine, 91 Texas 540; 40 L. R. A. 203.

St. Cloud v. Water, Light & Power Co., 88 Minn. 329; 92 N. W. 1112.

State v. Light & Development Co., 246 Mo. 618.

Union Land & Stock Co. v. U. S., 257 Fed. 635.

Second: *The suit and the forfeiture ordinance are based on the erroneous theory that since the ordinance rate of fare was superseded by a rate established by the Public Utili-*

ties Commission, the entire ordinance may be terminated by the City. The Supreme Court of this state has expressly held the contrary.

City of Chicago v. O'Connell, et al., 278 Ill. 591.

Chicago Rys. Co. v. City of Chicago, 292 Ill. 190.

Hoyne v. Chicago & Oak Park Elevated R. R. Co.,
294 Ill. 413.

In *City of Chicago v. O'Connell, et al.*, 278 Ill. 591 (decided before the suit in question was instituted), the Supreme Court said (pages 605, 607):

“Appellees contend, however, that the settlement ordinances and the unification ordinance, having been accepted and acted upon by the railway companies, constitute binding contracts between the City and the railway companies, and that their obligation cannot be impaired by any act of the legislature or by any order of the State Public Utilities Commission. Appellees' contention is undoubtedly sound so far as the contracts relate to matters which do not affect the public safety, welfare, comfort or convenience. Thus, the grant of the right to the railway companies to construct and operate street railways in the city, the agreement to divide the net receipts between the railway companies and the City and the option given to the City to purchase the railway properties at a certain price are all matters which do not affect the public safety, welfare, comfort or convenience, because it is immaterial to the public what person or corporation operates the street railways or what disposition is made of the profits, and over those matters neither the State nor the State Public Utilities Commission has any control by virtue of the police power * * *. If the City of Chicago, in entering into the contracts with the railway companies, has seen fit to make its option to purchase the street railway system, or its right to a certain portion of the net receipts derived from the operation of the system, or any other rights reserved to it by the ordinances dependent upon the non-exercise of the police power by the State, it cannot be heard to complain that by the exercise of the police power by the State, through the State Public Utilities Commission, it will lose its right to those benefits reserved to it by the ordinances.”

In *Chicago Railways Co. v. City of Chicago*, 292 Ill. 190, decided in February, 1920 (about a year before the passage of the forfeiture ordinance), the Supreme Court of Illinois said (pages 201, 202):

"It may be true that the constitutional and statutory provisions imply authority of a municipality to make an agreement with the public utility as to rates binding on the parties to the contract, so that neither one can repudiate the contract with the other and it can only be abrogated by them by mutual consent, but that is a very different proposition from authority to deprive the State of its rights to regulate fares, and lower them if found to be excessive and more than reasonable compensation for the service performed, or to raise them if so low as not to be fair, just and reasonable to the public utility. *This answers the argument that there can only be an increase in rates of fare on condition that the petitioners surrender every right secured to them by the contract. The contract being subject to legislative control, the intervention of the State, either on behalf of the public utility to secure a reasonable return for the service rendered or of the City to cause the reduction of rates which have become excessive, does not abrogate a contract, of which the law is an integral part.*"

Third: *A forfeiture of the rights of the companies could not be decreed in this suit because the bill was filed before any positive and unequivocal election had been made by the City or any representative thereof to forfeit all the rights of the companies and because the bill, according to its terms, is for specific performance, and, only in the alternative and contingently, for forfeiture.*

While the bill alleges that the City "does here and now elect that said contracts be cancelled and set aside in their entirety," such alleged election is only "*in case this court finds and decrees that said companies are authorized * * * to repudiate said contract in said essential terms relating to rates of fares.*"

The above allegation does not amount to a declaration that the City has unconditionally and definitely decided to

forfeit the ordinances, and such an allegation was a necessary condition precedent to the accrual of any cause of action.

Fourth: *This suit was brought before the City Council had declared a forfeiture. Such a declaration prior to the beginning of the suit was indispensable.*

The suit was filed more than a year before the passage by the City Council of the forfeiture ordinance of February 4, 1921. Action by the City Council declaring a forfeiture was a necessary condition precedent to the institution of any forfeiture proceeding by the City. The exercise of such a discretion on the part of the City is clearly legislative in its nature.

Byrne v. Chicago General Ry. Co., 169 Ill. 75.

Roby v. City of Chicago, 215 Ill. 604.

Murphy v. Chicago, Rock Island & Pacific R. R. Co.,
247 Ill. 614.

The City Council and not an executive or administrative officer is the proper authority to exercise the legislative power of the City.

Sec. 1, Art. V, Cities & Villages Act.

Porter v. Calumet Electric Street Ry. Co., 158 Fed.
521, 525, 528.

2 Dillon Municipal Corporations, 5th Ed., Secs.
501, 511, 516.

1 McQuillin Municipal Corporations, Secs. 373, 374,
375, 384-386.

2 Abbott's Municipal Corporations, Sec. 517.

Fifth: *The subsequent passage by the City Council of the forfeiture ordinance of February 4, 1921, cannot be availed of to cure this premature institution of the suit.*

It is unnecessary to cite authorities in support of this proposition. Since prior action by the City Council was a necessary condition precedent before the City could forfeit the rights of the companies, then any suit that was brought without such prior action by the City Council must

fail. There was no complete cause of action at the time the bill was filed.

In our opinion, no suit could be maintained at this time for a forfeiture of the franchises. We are not to be understood, however, as saying that the City may not hereafter forfeit the rights of the companies under the ordinances whenever it concludes that a ground of forfeiture exists and when the City Council, in unmistakable terms, has so declared by ordinance.

II.

ERRONEOUS CLAIMS OF BENEFITS TO THE CITY FROM INSTITUTION OF THE SUIT AND PASSAGE OF THE ORDINANCE.

A. The principal alleged purpose of the suit—even assuming that it could have been won—was entirely superfluous. It was claimed that by forfeiting the ordinances, the companies would lose their rights to operate in the streets after February 1, 1927. In our opinion, however, the companies have no such rights. The ordinances by their terms confer no franchise beyond twenty years. And, even if the City had sought to give the companies franchises extending after 1927, the effort would have been futile, for the City, by law, was and is expressly prohibited from making more than a twenty-year grant.

B. It was also claimed that a forfeiture would relieve the City of its obligation to purchase the property at the so-called “contract-price” named in the ordinances, but this also was an erroneous theory because the City is not *obliged to purchase* at this or any other price. The ordinances merely confer upon the city *an option to purchase* which the City, in its discretion, may exercise or refuse to exercise.

III.

DISADVANTAGES TO THE CITY WHICH HAVE RESULTED FROM SUCH POLICY.

The position heretofore taken that all rights of the Surface Lines under the ordinances were at an end has brought about the following results:

A. The City, since April, 1920, has refused to accept payment of its 55 per cent of the divisible net receipts, amounting now in the aggregate to \$8,189,138.42.* (See footnote.) There is a possible danger of the loss of this money so offered by the companies and rejected by the City. If foreclosure proceedings should be instituted against the properties of the Surface Lines under their outstanding mortgages, it might be contended on behalf of the bondholders that these moneys in the possession of the companies were subject to the lien of their debt, with the result that the City might be held to occupy merely the position of an unsecured general creditor of the companies.

We do not believe that such a position could be successfully maintained, and, if asserted, we should contend that the moneys so held by the companies constitute a trust fund held by them solely for the benefit of the City and that therefore the City would be entitled to claim the fund intact. Nevertheless, we recognize that there is some danger to the City and its rights in this fund, if such foreclosure proceeding were instituted. This possible danger to the fund is an important factor to be borne in mind in connection with this subject matter.

B. Since 1920, the City has not appointed representatives on the Boards of Supervising Engineers on the ground that the appointment of members on such boards would be inconsistent with the maintenance of the forfeiture proceedings. These boards supervise the extension, service and books of account of the Surface Line Companies.

C. Since the institution of the suit, the books of the companies have not been audited by representatives of the City. The ordinances provide for an an-

* The following amounts were offered to and refused by the City:

Due	Chicago City Railway Co.	Chicago Railways Co.	Total Amount
April 10, 1920...	\$ 442,990.71	\$1,004,372.22	\$1,447,362.93
April 10, 1921...	737,989.97	1,406,626.22	2,144,616.19
April 10, 1922...	1,075,744.78	1,858,367.57	2,934,112.35
April 10, 1923...	552,654.06	1,110,392.89	1,663,046.95
Total unaccepted			\$8,189,138.42

nual audit of the books of the companies by certified public accountants selected jointly by the companies and the City. The City has refused to participate in the selection of such accountants on the ground that such participation would be inconsistent with the maintenance of the forfeiture proceeding.

D. The City failed to require the companies to make from year to year, the extensions of their lines provided for in the ordinances.

On June 16, 1920, the City Council passed an ordinance requiring the extension and rehabilitation of the tracks of the Chicago Railways Company on Irving Park boulevard, from Austin avenue to a point near Narragansett avenue (C. J., pages 424-426).

On June 23, 1920, the then Mayor vetoed this ordinance (C. J., 477-478), on the ground that its passage would be inconsistent with the maintenance of the forfeiture proceeding.

On March 29, 1922, the City Council received a communication from the then Corporation Counsel advising against the passage of an ordinance providing for the construction and operation of a double track street railway in Milwaukee avenue from the C. & N. W. R. R. right of way to the city limits, which ordinance had been recommended for passage by the Committee on Local Transportation. The reason stated by the Corporation Counsel was that the passage of that ordinance would interfere with the successful maintenance of the forfeiture suit (C. J. 2323-4).

As a matter of general policy, pursuant to the veto of the then Mayor and opinion of the then Corporation Counsel above referred to, the City Council, since that time, has refrained from passing any ordinance requiring the construction of extensions by the Surface Lines under the settlement ordinances. As a result of this policy, practically no extensions have been built.

Under the settlement ordinances, the Chicago City Railway Company could have been required by the City Council to construct four miles of double track railway or eight miles of single track railway in each calendar year, and the Chicago Railways Company could have been required to construct six miles of double track, or twelve miles of single track in each calendar year.

It may be contended that extensions of the lines could not have been obtained without concurrent action by the Public Utilities Commission (now the Illinois

Commerce Commission). The provisions of the settlement ordinances of 1907 regarding extensions are explicit, and even if concurrent action by the Public Utilities Commission was required, such action could have been taken by the Public Utilities Commission and extension ordinances passed by the City Council which would have brought about the building of these extensions. And in this situation there would be no doubt that all rights of the companies to operate and maintain such additions and extensions would expire February 1, 1927.

On the other hand, had the provisions of the forfeiture ordinance of February 4, 1921, been carried out, a different situation would have resulted. Section 4 of the forfeiture ordinance directed the Corporation Counsel to make application to the Public Utilities Commission for orders requiring the companies to make such extensions and additions, *"upon the theory that the said contract ordinances and each of them has been cancelled."*

Adopting the theory of the forfeiture ordinance that the 1907 settlement ordinances had been terminated, and assuming that the Public Utilities Commission had entered orders requiring the companies to make additions and extensions, in our opinion before such orders could have become effective, it would have been necessary for the City Council to pass franchise ordinances authorizing such extensions or additions.

The effect and duration of such new franchise grants would be in doubt. Such new franchise grants passed by the City Council upon such a theory probably would have brought about a situation similar to that which existed immediately before the passage of the 1907 ordinances. At that time there were many lines operating under separate franchises which expired at various dates after February 1, 1907. These unexpired franchises constituted one of the most difficult questions with which the City had to deal in bringing about the 1907 traction settlement.

The inconsistency of the provisions of the forfeiture ordinance is apparent. Section 3 of the forfeiture ordinance declares the settlement ordinances (which constitute the sole and only right of the Companies in the streets) to be cancelled, annulled, abrogated and terminated, while Section 4 directs the Corporation Counsel to take steps before the Public Utilities Com-

mission to compel these same companies, whose rights have been forfeited, to build and operate new lines.

I V .

RECOMMENDATIONS.

We therefore respectfully recommend:

A. That the City Council pass an ordinance repealing the so-called forfeiture ordinance of February 4, 1921;

B. That the City dismiss the suit in the Circuit Court of Cook County, No. B-57959, entitled City of Chicago vs. Chicago Railways Company, *et al.*;

C. That the proper officers of the City immediately demand from the companies all moneys due the City as its 55 per cent of the divisible net receipts since the date of the last payment made to the City;

D. That the Mayor appoint representatives of the City on the two boards constituting the Boards of Supervising Engineers for the several companies constituting the Chicago Surface Lines;

E. That the City, pursuant to the settlement ordinances, require an immediate audit of the books of account of the companies from the date of the last previous audit in which the City participated; and,

F. That the City, in conjunction with the Illinois Commerce Commission, take prompt action to compel the companies to make track extensions, additions and service betterments in accordance with the terms of the settlement ordinances, so as to afford relief from the present intolerable conditions and, as far as possible, meet the ever-increasing demands for transportation in the several portions of the City.

FRANCIS X. BUSCH,
Corporation Counsel.

WM. H. SEXTON,
JEROME N. FRANK,
STEPHEN A. FOSTER,
WILLIAM H. HOLLY,

*Special Assistant Corporation Counsel
Assigned to the Committee on Local
Transportation.*

Procedure in Serving Injunction Writs Under Illinois Prohibition Act.

October 19, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have forwarded to this office a copy of the instructions which you are transmitting to the commanding officers of the various police districts in regard to the serving of injunction writs and notices in cases arising out of violation of the Illinois Prohibition Act. After examining these instructions we suggest a few minor changes. The instructions as we would revise them will read as follows:

"Attached find a copy of writ of injunction for the premises at (designated) together with original and copy of notice of preliminary hearing in the said cause.

"The officer assigned to serve the writ and notice will hand a copy of the writ of injunction to each person named therein; he will also hand the copy of the notice of preliminary hearing to each person named therein. He will obtain a receipt from each person served for the notice and for the copy of the writ of injunction, which receipt should appear in the space provided for this purpose in the original notice. If the receipt is refused, the officer serving the papers should fill out the affidavit at the bottom of the original notice which certifies that he served the notice by leaving a copy thereof and by leaving a copy of the writ of injunction, and bring the original notice to this office to be subscribed to before a notary public.

"You will see that all notices and copies of writs of injunction are served five days or more prior to the date set for hearing of the case."

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Fines Collected for Violations of Motor Vehicle Act.

Chicago, October 24, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter concerning the disposition of fines which are collected for violations of the State Motor Vehicle Act.

You state that you have been informed by one of the large motor clubs that the fines so collected amount to considerable money, that they are now credited to the general corporate fund, and that the law requires that the moneys thus collected should be used for the repair and upkeep of streets. You ask whether this has been correctly stated, and if so, whether it would be advisable to seek a transfer of the funds in question to the street repair fund.

The information you have received appears to be correct. Section 43. of the Motor Vehicle Act prescribes the penalties for the violation of the various sections of the act, provides for the revocation of the license of a persistent offender, says that the fines shall be paid over to the treasurer of the highway commissioners of the township or road district in which the offense is committed, and then adds the following proviso:

“Provided, however, that whenever any such violation shall occur within the limits of any city, village or incorporated town, or within the jurisdiction of any board of park commissioners, wherein no commissioners of highways exist or have jurisdiction, in such case all fines imposed for the violation of any of the provisions of this act shall be paid to the treasurer of such city, village or incorporated town or to the park commissioners within whose jurisdiction the offense is committed, by the justice of the peace, clerk of the court, or other officer to whom the amount of such fines shall be by law required to be paid by the constable, bailiff, sheriff, or other officer named in any execution issued for the

collection of the same, and all money so received by the treasurer of such city, village or incorporated town, or park commissioners, shall be used in repairing and improving the roads or streets, within such city, village, incorporated town or park; and in such cases it shall be the duty of the police officers and officials of cities, villages, incorporated towns and parks to prosecute for all fines and penalties under this act."

The fines heretofore paid over have been placed to the credit of the general corporate fund. There is nothing unlawful about crediting the money to this fund, since it can later be withdrawn and used as the statute requires. It cannot be put into what you call the "street repair fund," by which we assume you mean the "Vehicle Tax Fund," because the statute requires vehicle license fees "to be kept as a separate fund and used only for paying the cost and expenses of street or alley improvement or repair." (See Cities and Villages Act, Art. V, Sec. 1, Cl. 96.)

The question as to whether the money collected on these fines should be put into a separate fund, or allowed to go into the general corporate fund, is one that the Comptroller has to deal with, the only thing to be guarded against being the use to which the money is ultimately put.

Concerning the advisability of seeking a transfer of these funds, we see no advantage in that because, as just stated, it makes no difference what precise fund the money is in. However, we call your attention to the fact that there has been no specific appropriation of the moneys derived from these fines. The only appropriations made for street repairs or improvements have been made from the vehicle tax fund. There is no way of transferring the funds in such a way as to make them available at present. Appropriations made from the Vehicle Tax Fund must be drawn from the moneys collected by the tax and not from moneys collected from fines. There would have to be an additional appropriation if these funds are to be used. This cannot be made for the current year.

We recommend that in the future there should be such an account kept, or that such an adjustment be made, that

the Council may set apart these funds for the purposes intended by law when the appropriations are made for the year 1924 and subsequent years. For the present, if the Comptroller desires to segregate the money he may lawfully do so, but it cannot be used for street repairs or improvements during the current year because there has been no appropriation of the money for such purposes.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Contract for Removal of Dead Animals—Liability of City to Provide Loading Stations.

Chicago, October 29, 1923.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We have before us your letter of recent date concerning termination of the lease for a loading station for dead animals, to which you attached copy of a letter from the contractor for the removal of dead animals, and copy of the contract under which the work is now being done.

It appears from the letter of the Canal Melting Co., the contractor, that there has been a loading station for such dead animals maintained in the neighborhood of the Stock Yards for forty years; that the said loading station was leased to the contractor by the Chicago River & Indiana Railroad Co.; that the railroad company has served notice of the termination of the lease, giving the Canal Melting Co. sixty days from October 1, 1923, to vacate; and that the contractor desires that the City take it upon itself, through you, to get

this lease extended. You ask to be informed whether it is obligatory or advisable for the Department of Health to act in the matter.

We have examined the contract in question, and can find nothing therein which can be construed as making it obligatory on the City to secure a loading station for the contractor. The contractor, by its contract, of which the specifications form a part, covenants that it "shall at all times during the term of this contract keep and maintain proper depots for the reception of all such dead animals, at such place or places and of such capacity and construction as may be required or approved by the Commissioner of Health." This is one of the undertakings of the contractor which cannot be thrust back upon you without its constituting a plain breach of the contract, and the contractor's surety would be liable along with the contractor. The bond covering the contract is for \$25,000 and is signed by a responsible surety company.

However, while there is no obligation on the part of the City to act in the premises, it may be the better part of wisdom to intercede. There is a possibility of a default on account of the situation precipitated by the action of the railroad company, and in that event the damage to the City may exceed the \$25,000 for which the surety would be liable. In any case, it would be well to look to the future in this matter because the contract has only about one year and nine months to run. We therefore recommend that you make such effort as lies within your power, along the lines suggested in the letter of the contractor, to secure an extension of the lease. If you do this, it would be well to notify both the contractor and the bonding company that you do not relieve them of their obligation, but are acting merely as a friendly mediator at the request of the contractor.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Payment of Gas Bills by City Under Protest When
Illinois Commerce Commission Has
Raised the Rates.**

October 30, 1923.

HON. LOUIS E. GOSSELIN, Deputy Comptroller.

Dear Sir:

Replying to yours of the 15th inst., inquiring whether you should continue to note on vouchers issued by your office in payment of gas bills a statement that "the City of Chicago does not concede that the rates herein specified are lawful rates for gas consumed and the payment herein made is made under protest," we beg to advise that we know of no advantage accruing to the City by virtue of this practice.

As we understand the situation, it seems to be that prior to August 1, 1923, the City was consuming gas under a contract with the company that fixed the charge; that on August 1, 1923, a new rate fixed by the Commerce Commission became effective and that the City is now paying that rate. We also understand that the contract under which the City had been using gas expired before the present rate went into effect and that the City is now consuming gas the same as any other subscriber.

It is the settled law of this State that the Illinois Commerce Commission has jurisdiction and power to fix and regulate the rates charged by a public utility company, and the rate they have established must be regarded as the legal rate to be charged. It is true, the action of the commission in establishing a rate is subject to review by the courts, but we do not see how the notation your department has been making on its vouchers would add anything to the City's remedies in the event that such rate was not proper. Certainly the failure of your office to put the notation on its vouchers could not be construed as a waiver of any right the City might have.

The only way that we know of that the City could relieve itself of the burden of an excessive rate would be to prosecute an appeal from the order of the Commission fixing the rate, or by subsequently reopening the case before the Commission itself. We know of no advantage to be gained by paying the bills under protest.

Yours truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Bridge Tenders Not Entitled to Police Commissions Under Present Ordinance.

Chicago, October 30, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Pursuant to your request of October 23, 1923, for an opinion regarding the refusal of the Chief of Police to grant police commissions to bridge tenders, we have examined that provision of the Code of 1911 under which such commissions were granted (Section 1920) and have traced the amendments thereto in order to ascertain the reason for its omission from The Chicago Municipal Code of 1922.

On March 10, 1920 (Council Journal of that date at pages 2188-2193), the City Council passed an ordinance revising the entire chapter of the Code of 1911 on "Police." This revision took no account of the old chapter so far as either the numbering or the subject-matter of the sections was concerned, and in the course thereof Section 1920 of the old code was omitted. Between the date of the revision of March 10, 1920, and the date of the revision for The Chicago

Municipal Code of 1922, this chapter was amended several times, but the provisions of the omitted section were never reinserted.

Since you specifically ask our opinion in regard to this matter, we will state that we think it is advisable for bridge tenders to hold commissions as special police, but in view of the fact that the City Council saw fit to eliminate the provision for such exercise of the police power, a recommendation to restore this provision would more properly come from you than from this department.

Yours very truly,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Issuance of Vouchers for Rent of Space on Municipal
Pier by Chicago Steamship Line While Hold-
ing Over After Judgment for City
for Possession.**

October 30, 1923.

MR. HENRY MCGURREN, Superintendent of The Municipal Pier.

Dear Sir:

In regard to the warrants for collection issued against the Chicago Steamship Lines for their occupancy of the Municipal Pier for the month of September, 1923, and which we advised that you issue in a former communication of date October 24, 1923, we wish to suggest to you that in view of the fact that we have been apprised that the Steamship Lines intend to appeal their ouster from the pier by writ of error, we feel it would be wiser that these warrants should not be

issued. The reason is, that the judgment for possession was rendered in the early part of September, and although possession was not obtained for some time thereafter, nevertheless to attempt to bill the Chicago Steamship Lines for occupation which they received after the rendition of the judgment for possession, might be construed to be a waiver on the part of the City of the said judgment.

We feel that the City will not lose anything by not issuing these warrants, in that the company is bankrupt and could not pay them anyway, and further, the City intends to keep possession of the heating fixtures installed on the Municipal Pier by the Chicago Steamship Lines on the ground that they belong to the City as fixtures. It is probable that the value of these fixtures will compensate the City for the loss of the rent of the pier for the month of September.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Liability of City to Repair Corroded Supports Which
Allowed Sidewalk to Collapse on Structure
Leased by City.**

October 30, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You have requested the office of the Corporation Counsel to examine a lease dated December 4, 1913, between the City of Chicago and The Chicago Railways Company, the property being located at the northwest corner of Illinois street and La Salle street, for the purpose of ascertaining

whether or not the City is required under the terms of said lease to reconstruct the sidewalk adjacent to the said premises.

An investigation of the facts shows that the building located on these premises was formerly a car barn owned and used by the Chicago Railways Company. On December 4, 1913, the City of Chicago rented these premises and the buildings thereon located, for the purpose of using the same as a stable for police horses and drill hall for policemen. The premises included certain vaults located underneath the sidewalks. At that time, according to the information of Mr. Halley of the Management of Property Division, the vault supports which upheld the sidewalk overhead were *apparently* in good condition. Since that time, through ordinary wear and tear and decay, the said supports had become corroded and decayed, the results being that a short time ago several of them collapsed, allowing the sidewalk above to crumble and cave in. This created a condition dangerous to pedestrians, in that the aperture thus created was very large and of a depth of about ten feet. Mr. Halley states that Lieutenant Martin of the Traffic Division of the Police Station located in that Police District conferred with representatives of the Chicago Railway Company as to the advisability of filling up these apertures with cinders, and that the representatives of the street car company told him that they saw no reason why that should not be done. Accordingly, the City did fill up the sub-sidewalk space to a depth of ten feet with dirt and cinders, so that the present condition is that the sidewalk itself has largely fallen through to the vaults below and the entire aperture thus created has been filled with dirt and cinders up to the present street level.

On page ten of the lease hereinabove referred to, the following appears:

“Fifth. The Lessee agrees that he has examined and knows the condition of the demised premises and has received the same in good order and repair except as herein otherwise stated, and that no representation as to the

condition or repair thereof have been made by the Lessor, its officers or agents, prior to or at the execution of this Lease.

The Lessee further covenants and agrees that he will keep said premises and appurtenances together with all improvements and additions thereon and thereto in good repair, replacing all broken glass with glass of the same size and quality as that broken; that he will keep said premises and appurtenances, including catch basins, vaults and adjoining alleys in a clean and healthful condition, according to the City ordinances and the direction of the proper public officers during the terms of this Lease, at his own expense; and that he will clean the snow and ice from the sidewalks in front of said premises."

On page 18 of the said lease, Section 21, the following appears:

"The Lessee further covenants and agrees, that upon the termination of this lease by, for or through any reason or cause, he will convey all additions and improvements which have been made in whole or in part, at the Lessee's expense, or in or to which the Lessee shall have or make any claim to the Lessor by a good and sufficient deed of conveyance, and will immediately surrender, yield and deliver up peaceably to the Lessor said above described premises in as good condition as when the same were entered upon by the Lessee, and any and all buildings and improvements thereon in a good and perfect condition, *ordinary wear and tear, deterioration and decay excepted*, and at the same time will execute and deliver all receipts, releases and appurtenances and any assignments of insurance policy and all the papers that may be necessary or proper to perfect and complete in the Lessor all rights and titles to and in the said premises. * * *"

Upon the foregoing statement of facts and the foregoing two provisions in the said lease, arise a number of doubtful legal questions. It seems highly probable that the decay and corrosion of the vault supports is due to ordinary wear and tear and that under the 21st paragraph of the said lease the City would not be obliged to return the premises in the same condition as when it first received them with regard to these vault supports. It also seems very doubtful that the

vault supports could have been in a proper condition when first received by the City, since it is very unlikely that these supports would become corroded in such a short period of time, if they had been in proper condition at the inception of that period.

The question also arises as to whether or not the Chicago Railways Company have not waived their right to insist upon the City's keeping the vault supports and sidewalk in proper repair, by acquiescing and expressing satisfaction at the City's contemplated action in filling up these apertures with cinders. Whether such a conclusion of law is warranted can only be ascertained after a minute investigation of the facts.

Our advice to you at this time, therefore, is, that since there is considerable doubt as to whether or not the City is obliged to replace this sidewalk, and since the Chicago Railways Company have not made any request as yet that this be done, that the matter be allowed to rest in *status quo* at least until such a demand is made. Should the premises be again leased (the present lease expires December 31, 1923) the premises can be left as they are unless their present condition interferes with the City's use of them. Should the City's lease not be renewed, and should the Chicago Railways Company demand that the City replace this sidewalk, it is then suggested that the matter be placed in the hands of the Corporation Counsel for the purpose of making an adjustment, if possible on this claim.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Pension Paid Retired Employee Who Is Subsequently
Reinstated by Court Order Must be Repaid.**

October 31, 1923.

MR. WILLIAM D. CASSIDY,

Clerk, Municipal Employees' Annuity and Benefit Fund.

Dear Sir:

We have your letter of October 18, 1923, relative to the case of John B. Hittel, Chief Street Engineer, Board of Local Improvements, who resigned January 20, 1917, and was on March 2, 1923, restored by order of court in case No. B61302, Circuit Court.

You state that on January 6, 1921, Mr. Hittell applied for benefits from the Police Pension Fund and that he has been drawing \$50 per month from January 18, 1921.

Mr. Hittell now has a suit against the City in case No. B95227, Circuit Court, for payment of back salary. The position taken by Mr. Hittel in the suit for reinstatement was inconsistent with his application for pension, and as the court has restored him to office he is in the position of a man who has not been legally retired from the service and therefore not entitled to benefits from the Pension Fund. The amounts paid to him from the Pension Fund were illegally paid, and he should be required to repay the full amount.

Yours truly,

FRANK M. PADDEN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure to Require Street Car Extensions.

November 1, 1923.

HON. U. S. SCHWARTZ, Chairman, Local Transportation Committee.

Dear Sir:

Replying to your letter of October 29th, concerning the right of the City Council to pass ordinances requiring the Chicago Surface Lines to construct the full quota of extensions for the year 1923, as provided by Section 3 of the Settlement Ordinances, we are of the opinion that the companies can be required to construct only such portion of the full quota of extensions for this year as it may be reasonably possible for them to construct on or before December 31, 1923, in such time as may remain after the City has complied with said ordinances for the proper ordering of compulsory extensions.

This raises the question immediately as to what steps the City must take in order to be in position to demand that the companies build any extensions as a part of the compulsory extensions required under said Section 3.

Clause Ninety of Section 1, Article V, of the Cities and Villages Act (Cahill's Revised Statutes of 1921) provides as follows in relations to the initial step that must be taken in order to lawfully lay down street railway tracks in city streets:

"The City Council or Board of Trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the State, now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for rail-

road purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile, if any, in excess of the whole miles measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes."

It is clear that before any ordinance can be validly passed requiring the companies to construct any extensions, frontage consents to comply with the above quoted section must be properly filed.

Section 3, of Chapter 131a of Cahill's Revised Statutes of 1921, relating to street railroads, is as follows:

"No such company shall have the right to locate or construct its road upon or along any street or alley, or over any public ground in any incorporated city, town or village without the consent of the corporate authorities of such city, town or village, nor upon or along any road or highway or upon any public ground without any incorporated city, town or village except upon the consent of the county board. Such consent may be granted for any period not longer than twenty years, on the petition of the company, upon such terms and conditions not inconsistent with the provisions of this Act, as such corporate authorities or county board, as the case may be, shall deem for the best interests of the public: *Provided*, no such consent shall be granted unless at least ten days' public notice of the time and place of presenting such petition shall have been first given by publication in some newspaper published in the city or county where such road is to be constructed, and except upon the condition that the company will pay all damages to owners of property abutting upon the street, alley, road, highway or public ground, upon or over which such road is to be constructed, which they may sustain by reason of the location or construction of the road; the same to be ascertained and paid in the manner provided by law for the exercise of the right of eminent domain.

Where, however, any company is now operating or may hereafter operate lines of street railway in any in-

corporated city, town or village, under ordinances or grants, obligating such street railway company to construct specified mileage of extensions or additional lines of street railway upon the order of such incorporated city, town or village, the consent of such incorporated city, town or village, for the construction of such specified mileage of extensions or additional lines of street railway may be granted, without a petition of the street railway company; *Provided, however, that in such case the incorporated city, town or village shall give at least ten (10) days' public notice by publication in some newspaper published in the city, town or village where such road is to be constructed, of its intention to require the construction of such specified mileage or additional lines of street railway.* In case such incorporated city, town or village shall give public notice as herein provided, no further public notice need be given, but the company shall pay all damages to owners of property abutting upon the streets, alleys, roads, highways or upon grades upon or over which such road is to be constructed which they may sustain by reason of the location or construction of the road as in other cases; such damages to be ascertained and paid in the manner provided by law for the exercise of the right of eminent domain."

The reasonable construction of that section of the statute would require that after frontage consents had been filed as above mentioned, the City Council by order properly passed should manifest its intention to require said company or companies to build certain extensions as a part of the extensions that may be required on the order of said incorporated city, town or village, and we think that such order should direct the publication of ten days' notice as mentioned in the statute. *In any case the publishing of proper notice in accordance with the statute is one of the steps that must be taken before the City can require the company to build any extensions.*

Section 3 of the ordinance of the Chicago Railways Company, passed February 11, 1907, provides as follows:

"* * * at any time after three (3) years from the acceptance of this ordinance, the Company shall upon the order of the City Council of the City, construct and equip

such additional extensions as may be required by the City and shall operate the same as a part of its system in conformity with the provisions of this ordinance, provided * * * that the Company shall not be obligated hereby to construct more than six miles of double track railway or twelve miles of single track railway *in any one calendar year during the term of this grant.* * * * The Company shall not be authorized or obligated to construct any extension of its street railway system upon streets on which street railways are not located when this ordinance goes into effect until the City has granted to the Company whatever authority in addition to this ordinance may be necessary to comply with the frontage consent laws of the State of Illinois.”

Section 3 of the ordinance of the Chicago City Railway Company, dated February 11, 1907, is in identical language except that the Company is not required to construct more than four miles of double track railway or eight miles of single track railway in any one calendar year during the term of the grant. The ordinance of the Calumet and South Chicago Street Railway Company, dated March 30, 1908, is also identical with the section quoted above except that the compulsory extensions the City may require are limited to three miles of single track railway in any one calendar year.

In our opinion in order for the City to compel the building of such extensions, four steps must be taken and they should be taken in the following order:

First: An order should be passed by the City Council stating its intention to require certain extensions to be built and ordering that proper publication of the City's intention to require such extensions be made, and proper notice of the same brought to the attention of the company or companies concerned;

Second: The requisite frontage consent petitions covering the portions of streets upon which said street railway tracks are to be laid, should be secured and filed with the City Council;

Third: Said notice should be published according to the statute; and

Fourth: An ordinance or ordinances should be passed granting to the company or companies the necessary franchises or licenses for the use of the streets or portions of streets in which said tracks are to be laid, and further ordering and requiring that the company or companies proceed at once to the building of such extensions and limiting the time within which such extensions shall be completed and placed in operation.

Since Section 3 of the Settlement Ordinances limits the total mileage that the City may compel the companies to build in any one calendar year, we are of the opinion that the above named steps, ending with the necessary ordinance authority for the use of the streets or portions thereof should be taken as early as possible so that the companies may have reasonable time in each year in which to construct the quota of extensions required for that year. And since any ordinance that may be passed concerning extensions required for 1923 will be passed late in the year, we are of the opinion that only such portion of the full quota of compulsory extensions for 1923 may be required as persons skilled in such construction would deem reasonably possible of construction in the part of the year remaining after such ordinance becomes effective.

Your request that we prepare *now* ordinances covering certain portions of streets designated in a program of extensions recommended by your Committee is, therefore, premature, as the City has not yet taken the necessary steps to be in position to demand the building of such extensions. When your Committee and the City Council may be ready to proceed in the manner outlined above to compel extensions, we shall be glad to assist in the preparation of any necessary documents, whether orders, notices or ordinances.

We submit herewith, (a) a form of order stating the intention of the City Council to require the particular extension and directing that proper publication of such intention be made, and (b) a form of frontage consent petition, which form should be varied in describing the street on

which the tracks shall be laid and the Company which is to operate the same.

Respectfully submitted,

FRANCIS X. BUSCH,
Corporation Counsel.

C. M. DOTY,
Assistant Corporation Counsel.

WM. H. SEXTON,

WM. H. HOLLY,

JEROME N. FRANK,
*Special Corporation Counsel Assigned
to Committee on Local Transportation.*

Contract With Corporation Not Licensed to do Business in State.

Chicago, November 7, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have asked our advice with reference to the propriety of letting a contract for the installation of a meter at the Central Park Avenue Pumping Station to the Builders Iron Foundry, of Providence, R. I. It appears that this concern is a corporation organized under the laws of another state and not licensed to do business in this state, that it is the lowest bidder, and that it is desirable to let the contract to it because its type of meter conforms to those already installed.

You are confronted, however, with our opinion of April 18, 1923, in which we advised you that contracts should not be entered into with foreign corporations not licensed to do business in this state.

The question of whether or not this corporation may be given this contract depends on the facts. It is always difficult to determine such a question where there is no actual work done in the state by such a corporation in connection with a contract, as is stated to be the case in the present instance.

The City cannot discriminate against a natural person residing in another state, but a corporation is on a different footing. A corporation need not be recognized as a person under the law in this state merely because it has been organized as a corporation. The State in the case of an Illinois corporation may impose such conditions on its being given that status as it sees fit, and in the case of foreign corporations it may likewise specify under what terms it will be given the rights necessary to act as a person in this state.

On the other hand, it would be an interference with interstate commerce if the Legislature undertook to prevent a foreign corporation regularly engaged in a legitimate branch of interstate commerce from delivering goods in this state, from having an agent visit the state for the purpose of taking orders, and even from using the courts for the purpose of enforcing its rights.

Attorneys representing the Builders Iron Foundry having submitted the cases of *Holder v. Aultman*, 169 U. S. 81, and *International Text Book Co. v. Pigg*, 217 U. S. 91, as cases that fortify them in their position that merely because they will do no work of erection in carrying out the contract they do not render themselves liable under the Corporation Act. The first of these cases passes on the validity of a contract which was signed by the local agent of a foreign corporation but required other signatures and the approval of the home office before taking effect. The court held that such a contract is not "made in this state" within the meaning of the statute. The other case holds that where a foreign corporation engaged in teaching by correspondence has an agent in the state continuously and receives and forwards money, etc., such a corporation does business within the state

but that the particular business is of such a kind that it is embraced within the meaning of the term "commerce among the states" within the commerce clause of the Federal constitution.

Neither the cases cited nor many others along the same line that could be cited are very helpful in the particular matter before us. As a general rule it may be said that a single transaction would not bring the party within the scope of the statute, but we are informed that there is an agent of the company here who transacts business by taking orders and securing contracts.

In fact, if we were called upon to determine the question, from the information at hand we would be inclined to the opinion that the corporation in question is bound to take out a license if it continues to do as it has done before.

We do not feel, however, that we are bound to make this decision for them. It is claimed that the contract will be signed in Rhode Island and therefore it is not a case of doing business in this state but merely taking an order subject to verification and approval at the home office. Such being the case, if the officers of the corporation insist that they do not come within the purview of the statute, and are willing to take the chance of a possible voiding of the contract and a penalty as provided by statute, we do not feel that it is necessary for you to refuse to contract with the corporation. The case that we mentioned in our former opinion (*Ryerson v. Shaw*, 277 Ill. 529) holds that a foreign corporation cannot plead its own incapacity to do business within a state for the purpose of evading its contractual obligations.

Therefore, while the situation is such that we cannot say there is no doubt of the corporation's right to contract, we believe it will be proper for you to accept their statements at face value and assume that they are justified in their position in saying that the transaction in question does not obligate them to conform to the State law requiring foreign corporations to take out licenses.

We recommend that you contract as you propose and that you suggest to the company's representatives that they should proceed to qualify under the laws of this state.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Loss of City's Riparian Rights Appertaining to Clarendon Beach by Construction of Lake Boulevard by Park Commissioners — Condemning of Property Devoted to a Public Use For a Different Public Use.

November 10, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

The Corporation Counsel has received a request from you to render an opinion on the legal status of the City property situated on Clarendon avenue and now used as a municipal bathing beach, with regard to the proposed action of the Lincoln Park Commissioners. It appears that the Board of Commissioners of Lincoln Park have decided to construct a boulevard parallel to the north shore of Lake Michigan in such a manner as to render useless for bathing purposes the aforementioned property of the City located at Clarendon beach.

The statute under which the Lincoln Park Commissioners derive their power to proceed in constructing such a boulevard was passed in 1895 and provides in substance that when the Board of Park Commissioners shall decide to en-

large a park bordering on public waters by locating a boulevard or driveway over the bed of such waters, they shall prepare and adopt a plan of such enlargement and in the same shall locate a boulevard or driveway over and upon the bed of such public waters; and that they may proceed to acquire the riparian rights of the owners of land adjoining said proposed boulevard by agreeing with said owners that in return for the surrender of their riparian rights they shall be given the title to a portion of the submerged land lying between the proposed boulevard and the former shore line. In case the Park Commissioners and the owners of the shore adjoining cannot agree on the terms whereby the riparian rights are to be surrendered, then the Board of Commissioners may proceed to condemn the said riparian rights. For the sake of clearness, the sections of the aforementioned statute which are germane to the legal questions considered in this opinion are set forth, as appearing in Cahill's Illinois Revised Statutes for 1923, Chapter 105, Par. 187, page 2454:

“ENLARGEMENT AND CONNECTION OF PARKS BORDERING ON PUBLIC WATERS.

An Act to enable park commissioners having control of any park bordering upon public waters in this State to enlarge the same from time to time, and granting submerged lands for the purpose of such enlargements and to defray the cost thereof.

Approved June 15, 1895. In force July 1, 1895. L. 1895, p. 282. Act held constitutional. *Commissioners of Lincoln Park v. Fahrney*, 250-256.

Section 187. *Reclaiming submerged lands—Plans—Title.*) Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That in all cases where lands within specified boundaries bordering on public waters in this State have been declared to be a public park, and where the commissioners of such park have been named in the Act establishing the same, and their successors have since been appointed by the Governor of this State, the said commissioners of any such park shall have power from time to time in their discretion to enlarge the same by reclaiming submerged lands under said public waters in the following manner: Said board of commissioners upon deciding to make any such enlargement of said park shall prepare

and adopt a plan of such enlargement and in the same shall locate a boulevard or driveway over and upon the bed of such public waters. The *termini* of such boulevard or driveway shall be within the district or territory the property of which shall be taxable for the maintenance of the park under the control of said board, and one at least of such *termini* shall be at or upon some driveway or boulevard already established and under the control of said board of commissioners. The said proposed boulevard or driveway shall be so located as not to interfere with the navigation of such public waters for the purposes of commerce. Said plan shall provide for such breakwater, seawall or other protection upon the water line of said boulevard or driveway as shall be necessary to save the same from destruction or waste by water. Said plan shall also locate upon the submerged lands between the shore line of such public waters as it exists at the time said plan is prepared and adopted and the inner line of the proposed boulevard and driveway, such portions of the submerged lands to hold, use and improve for the purposes of a public park under its control and management. Said board of commissioners after the preparation and adoption of said plan shall make an estimate of the cost of the construction of said boulevard and driveway and the filling in and reclamation of all the submerged lands lying between the inner line of said boulevard and the shore line of such public waters. Thereupon the title of such submerged lands over which the said boulevard or driveway is located, and of the said submerged lands between said boulevard as located and the shore line, shall become and be vested in and is hereby granted to the said board of commissioners, in fee simple for park purposes, as hereinafter in this Act set forth. (J. & A., Par. 8099.)

188. *Riparian rights—Proceeding to establish boundary line.*) Section 2. The riparian rights of the owners of lands along the shore adjoining such submerged land, and such land along the said shore as to the said board shall seem necessary and desirable, the said board of commissioners may acquire by contract with or deeds from any such owner, and in case of inability to agree with any such owner proceedings may be had to condemn such rights and such lands according to the provisions of Article 9 of an act entitled, 'An act to provide for the incorporation of cities and villages' (approved April 10, 1872), and the amendments thereof."

It may be noted at this point that the City of Chicago has not up to the present time entered into any agreement with the Board of Lincoln Park Commissioners whereby the City has relinquished its riparian rights in its property at Clarendon beach. The only way by which the City of Chicago could manifest its intention to relinquish such rights and could bind itself in the relinquishment of said rights is by authority of an ordinance duly passed by the City Council of the City of Chicago and an instrument executed by the proper administrative official pursuant to such authority. No such ordinance has ever been passed.

An investigation of the City's ownership in the property located at Clarendon beach shows that Lot 4 of said property described as follows:

Lot 4, School Trustees Subdivision, fractional section 16-40-14,

was acquired in 1875 by the Town of Lake View from the Graceland Cemetery Company and was subsequently acquired by the City by the annexation of the Town of Lake View. That Lots 2 and 3 of said property described as follows:

Lots two (2) and three (3) in School Trustees Subdivision, of fractional section sixteen (16), township forty (40) North, Range fourteen (14) East of the third principal meridian, situated in the City of Chicago, in the County of Cook, in the State of Illinois,

were acquired by warranty deed on July 25, A. D. 1923, from Azairah T. Galt for and in consideration of the sum of one hundred and thirty thousand (\$130,000) dollars; that a portion of Sub-lot 4 of Lot 1, described as follows:

all of sub-lot four (4) (except the south sixty (60) feet thereof) in the partition of the south fifteen hundred and thirty-one (1531) feet of lot one (1) in School Trustees Subdivision of fractional section sixteen (16), township forty (40) North, Range fourteen (14) East of the third principal meridian (except so much thereof as has been conveyed to Devotion C. Eddy by deed, dated February 10, 1855, in book 80, page 538) together with all improvements thereon and all riparian rights and other rights of whatsoever nature thereunto appertaining, and all

accretions thereto, situated in the City of Chicago, in the County of Cook and State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of the State,

was acquired on November 25, A. D. 1913, by warranty deed from Minnie and John Allmendinger for and in consideration of the sum of fifty-eight thousand (\$58,000) dollars; that Sub-lot 3 of said property legally described as follows,

sub-lot three (3) in the Superior Court partition of the south fifteen hundred and thirty-one (1531) feet of lot one (1) in the School Trustees Subdivision of fractional section sixteen (16) in township forty (40) North, Range fourteen (14), East of the third principal meridian (except so much thereof as has been conveyed to Devotion C. Eddy, by deed, dated February 10, 1855, and recorded in book 80, page 538),

was acquired on August 29, 1918, from Sam A. Kahn, in consideration of the sum of ninety-eight thousand (\$98,000) dollars.

The aforementioned conveyance from Azariah T. Galt is a conveyance of all rights in the said real property to the City of Chicago with the sole qualification that the said premises thereby conveyed should be used only for bathing beach and park purposes for the period of ten years from and after the date of conveyance. Ten years having now expired, the City owns a fee simple in said premises, together with all legal rights in the said premises including all riparian rights. The aforementioned conveyance from Minnie Allmendinger is a conveyance of fee simple to the City of Chicago so that the City thereby acquired all legal rights of ownership in said property including all riparian rights.

Lot 4 aforesaid, is now occupied by a pumping station, the grounds around which are improved as a park. Exclusive of the pumping station property, the Clarendon bathing beach consists of Lots two, three, a portion of Sub-lot four and Sub-lot three aforesaid, comprising about eight and six tenths (8.6) acres, which the City purchased in 1913, 1918 and 1923 for a total of two hundred and eighteen thousand dollars (\$218,000). The property has enhanced in value

since its purchase. The City has expended for buildings and equipment on the bathing beach property, about three hundred twelve thousand and eight hundred forty-nine dollars (\$312,849), so that the Clarendon bathing beach represents an aggregate investment of about five hundred ninety-eight thousand eight hundred forty-nine dollars (\$598,849).

The Lincoln Park Commissioners claim that about 1912 they adopted a plan of a proposed boulevard over and upon the bed of Lake Michigan; that the said boulevard was located some distance out into the lake from the shore line and extended from about Fullerton avenue to Devon avenue; and they claim that by virtue of the adoption of such plat the title to the bed of the lake between the shore line and the proposed boulevard vested in said Park Commissioners, subject to the riparian rights of the shore owners.

The Lincoln Park Commissioners are now proposing to interfere with the riparian rights of the City in the Clarendon beach property. As defined by the Supreme Court of Illinois in the case of *John Miller v. The Commissioners of Lincoln Park*, 278 Ill. 400, at 404, riparian rights of property adjoining Lake Michigan are "the right of accretion and the right of access to the water from their land. (*Revell v. People*, 177 Ill. 468; *Commissioners of Lincoln Park v. Fahrney*, 250 Ill. 256.)" The riparian rights in connection with the use of this particular piece of property constitute the most valuable rights in the property, in that the right to use said property for a bathing beach depends upon the riparian right of access to the water. Since the Lincoln Park Commissioners in their designs to construct a boulevard on the submerged lands of Lake Michigan parallel to the shore line of this property purpose to create a stagnant pool of water unfit for bathing purposes, it necessarily follows that the riparian rights incidental to the enjoyment of this property are being interfered with inasmuch as the property can no longer be used for the purposes of a bathing beach.

Since up to the present time the Lincoln Park Commissioners have not as aforesaid obtained the consent of the

City of Chicago to the relinquishment of the City's riparian rights in this property, it is obvious that they have no right to construct this boulevard as they at present propose to construct it. The question, however, arises whether the Board of Commissioners of Lincoln Park has the power to condemn the riparian rights of the City in this property. That question will now be considered.

The principle of law obtaining in all eminent domain cases for the condemnation of land for public purposes is that when the land to be condemned is already devoted to a public purpose and a new use to which it is proposed to put that land would totally destroy its use for the former purpose, it cannot be condemned. In the case of *City of Moline v. Greene*, 252 Ill. 475, the Supreme Court held that when property was already devoted to a public use it could not be condemned for a different public use unless there were express statutory authority. In that case the City of Moline had attempted to condemn a portion of the property occupied by a public library for the purposes of widening the street. The court in that case, at page 477, said:

“(1) Conceding that the Legislature has power to authorize public property devoted to one public use to be taken and appropriated to a different use for the public benefit, the question here for decision is: Has the Legislature, by any act adopted by it, authorized the taking of the library property by appellant? The library is a public library, and the land sought to be taken from it is devoted to a public use. *The general rule is that such property cannot be taken and appropriated to another and different use, unless the legislative intent to so take it has been manifested in express terms or by necessary implication.* *Chicago & Alton Railroad Co. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485; *Chicago & Northwestern Railway Co. v. City of Chicago*, 151 Ill. 348, 37 N. E. 842; 10 Am. & Eng. Enc. of Law, 1094; 15 Cyc. 616.

(2) It is not contended by appellant that express authority is found in any legislative act to take the property here sought to be taken; but it is insisted such authority is necessarily implied from the said clause of Section 1 of Article 5 of the Cities and Villages Act

(Hurd's Rev. St. 1909, C. 24, Section 62), which confers power upon the municipal authorities 'to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.' In *Chicago & Northwestern Railway Co. v. City of Chicago*, *supra*, the right of the City to extend streets across the right of way of the railroad company was denied by the company. The court held that the clause of the Cities and Villages Act above quoted did not authorize the taking of property already devoted to a public use, but that the eighty-ninth clause of Section 1 of Article 5 did authorize the City to extend its streets across the railroad right of way and tracks. That clause confers power upon the City to extend, by condemnation or otherwise, any street, alley, or highway over or across any railroad track, right of way, or land of any railroad company within the corporate limits. Section 17 of the chapter on railroads (Hurd's Rev. St. 1909, C. 14, Section 18) confers power upon railroad corporation to take, by condemnation, property necessary to the building, operating or running of its roads; but in *Illinois Central Railroad Co. v. Chicago, Burlington & Northern Railroad Co.*, 122 Ill. 473, 13 N. E. 140, it was held that this general grant of power to railroad corporations to take real estate for railroad purposes was not intended to extend to property already applied to a public use. In that case the Chicago, Burlington & Northern Railroad Company sought to condemn for railroad purposes land belonging to the Illinois Central Railroad Company running longitudinally with and constituting a part of that company's right of way. The court held this was unauthorized, and said: 'That the Legislature of the state might, subject to the conditions imposed by the constitution, take the property for the purposes in question we have no doubt, and we think it equally clear that the Legislature might, by a general law manifesting such intention, authorize one railroad company to condemn a part of the right of way of another to the extent and for the uses proposed in this case; but without such legislative authority or enabling act it is manifest the taking of it would be unauthorized.'

A number of other cases could be cited to the same effect.

A few of them are:

Gillette v. Aurora R. Co., 228 Ill. 261.

St. Louis R. Co. v. Postal Tel. Co., 173 Ill. 508.

Lake Shore R. Co. v. Chicago R. Co., 97 Ill. 506.

Central City Horse R. Co. v. Ft. Clark Horse R. Co.,
81 Ill. 523.

Chicago R. Co. v. Lake, 71 Ill. 333, 20 C. J. 602.

An examination of the statute under which the Lincoln Park Board is acting in condemning riparian rights for this proposed boulevard shows that it is a general statute, and therefore under the authority of the case of *City of Moline v. Greene, supra*, there is no such authority conferred as would justify the condemnation of the City's riparian rights in this property. For it is obvious that the condemnation of the riparian rights of the City in the Clarendon beach property would mean that the property could no longer be used as a bathing beach, and hence its use for the public purpose for which it is now-used would be totally impaired.

Our conclusion, therefore, is that the City of Chicago has a complete defense to any condemnation proceeding which might be brought to compel it to relinquish its riparian rights in this property. Should the Board of Lincoln Park Commissioners attempt to proceed with the construction of this boulevard in accordance with their present plans and designs in such a way as to interfere or threaten to interfere with the use of this property as a public bathing beach, as they are now doing, a bill for an injunction should be at once filed to restrain the said Commissioners from proceeding with the construction of this boulevard.

It may be that an arrangement satisfactory to both the City of Chicago and the Lincoln Park Commissioners can be entered into if the Lincoln Park Commissioners will agree to construct a similar beach with equal bathing facilities to those of Clarendon beach and upon the outer shore line of the new boulevard. In order to make such an agreement binding, the City of Chicago should enter into an agreement with the Lincoln Park Commissioners whereby the Lincoln Park Commissioners agree to establish such a bathing beach as aforesaid in consideration of the City's relinquishing its riparian rights.

It should not be overlooked that the terms on which most riparian rights are acquired is by the Park Commissioners granting a portion of the submerged land between the old shore line and the proposed boulevard to the land owner. The City should insist on this consideration also; for should it later desire to sell the land (and it probably will have no further use for it) the right to fill in additional land will be a valuable increase to the property.

Respectfully submitted,

ALBERT H. VEEDER,
EUGENE H. DUPEE,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Computation of Pension Rights of Municipal Employee Transferred to Police Department.

November 12, 1923.

MR. WM. D. CASSIDY, Clerk, Municipal Employees' Annuity
and Benefit Fund.

Dear Sir:

I have your letter of November 9, 1923, asking for a written opinion covering the right to prior service annuity in the Municipal Employees' Annuity and Benefit Fund of Michael J. Sheridan, elevator operator, certified to the Public Library March 11, 1912, and transferred to the Police Department June 23, 1923.

The Municipal Employees' Annuity and Benefit Fund Act of 1921 makes no provision for giving credit for prior service to those who have been contributors to some other pension fund, and Mr. Sheridan's rights in the Municipal

Employees' Annuity and Benefit Fund therefore must be determined as of the date of his transfer to the Police Department. In other words, he must be treated as a future entrant.

Yours truly,

FRANK M. PADDEN,
Acting Corporation Counsel.

Exemption From City License of Homes For Delinquent, Etc., Children Licensed by the State.

November 12, 1923.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

On November 1, 1923, you requested an opinion from this department as to whether, under The Chicago Municipal Code of 1922, The Morgan Park Home for Children, located at 10704 Prospect avenue, should be required to take out a City license as a home for children.

It appears that on March 20, 1920, articles of incorporation were issued to The Morgan Park Manual Training School for Boys. The certificate thereto attached sets forth, among other things, that the proposed corporation was to be formed under an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Corporations," approved April 18, 1872, and all acts amendatory thereof, and especially under "An Act to provide for and aid Training Schools for Boys," approved June 18, 1883, and all acts amendatory thereof; that the objects of the proposed corporation are:

"(a) To establish, maintain and carry on a Training School for Boys, with all the powers, rights and privileges of corporations of this State, not for pecuniary profit, and shall be, and hereby is exempted from all State and local taxes.

(b) To provide a home and proper training for such Boys as may be committed to its charge.

(c) To receive into such school all Boys of all denominations committed thereto under the provisions of such act and to have exclusive custody, care and guardianship of such boys, to provide for their support and comfort, and instruct them in such branches of useful knowledge as may be suited to their years and capacities, and shall cause them to be taught or trained in some trade for industrial pursuits, and for the purpose of their education and training, and that they may assist in their own support, they shall be required to perform such tasks suitable to their years and sex as may be prescribed by the officers and managers of the corporation, as may be reasonable and proper."

Section 1873 of the Code defines a home within the meaning of that article. Section 1874 reads as follows:

"1874. *License required.*) It shall be unlawful for any person, firm, association or corporation, other than the regularly constituted authorities of the United States, the County of Cook, the City of Chicago, or any association or institution for the care of children which has been accredited, certified or licensed by the State of Illinois, pursuant to an act of the legislature, to regulate the treatment and control of dependent, neglected and delinquent children to open, conduct, manage or maintain any home, as defined in this article, within the corporate limits of the city, without first obtaining a license therefor as hereinafter provided."

Inasmuch as The Morgan Park Home for Children, also known as The Morgan Park Manual Training School for Boys, operates under a State license, and is one of those institutions designated by the Juvenile Court Act as an institution to which dependent, neglected and delinquent children may be committed, it comes clearly within the exception of Section 1874 relating to institutions certified by the State for that purpose, and consequently cannot be required to take out a City license.

Very truly yours,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Duty of City to Provide Ambulance Service.

November 12, 1923.

HON. FRANK J. LINK, Chairman, Committee on Public Health.

Dear Sir :

We have your inquiry regarding the question of the City's obligation and authority to provide ambulance service for its residents, and we beg leave to make the following reply :

The City, while it has the power to establish ambulance service to afford emergency relief to persons taken suddenly ill or becoming injured on the public highways, is not required to do so for the reason that we do not find such a mandatory provision in our statutes. Primarily, the taking care of the indigent sick is a function expected to be performed by the County. The County, however, has never established an emergency service and this necessary service which required prompt attention was shifted to the City. That the City may provide for the upkeep of an ambulance bureau and render emergency service cannot be questioned, thereby performing concurrently with the County a duty that it owes to its residents. There appears to be some controversy, should the City continue to maintain this emergency relief work, as to which department of the City Government such service should be assigned, and as this is a matter not of law, but of policy, we feel your committee is better able to judge which department can give the greatest service.

Very truly yours,

JAY A. SCHILLER,

Approved :

Assistant Corporation Counsel.

FRANK M. PADDEN,

Acting Corporation Counsel.

**Power of City to Require Washroom and Lavatory to
Be Maintained in Restaurants.**

November 13, 1923.

HON. FRANK J. TOMCZAK, Alderman, 39th Ward.

Dear Sir:

In reply to your request of November 3, 1923, for advice as to the power of the City to demand the installation of washrooms and lavatories in restaurants as a condition precedent to the issuance of a license we beg to advise:

(a) The Supreme Court of this state in the case of *Potson v. City of Chicago*, 304 Ill. 222, held that the City was without power and authority to license or regulate restaurants.

(b) The decision in the *Potson* case applies to new restaurants as well as to existing restaurants.

(c) It may be that we could sustain an ordinance requiring the installation and maintenance of washrooms and lavatories in restaurants, although it is not possible in the face of the decision in the *Potson* case for the City to demand such facilities *as a condition for the issuing of licenses*. This would have to be in the nature of a health regulation independent of the question of license. If you desire that this department draw an ordinance along the lines just suggested, we shall be glad to do so upon request.

Yours truly,

RUTH C. NELSON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Claim That City Has Abandoned Alley by Erecting
Posts and Closing it to Vehicles.**

November 14, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of November 12, 1923, requesting advice concerning the action you are to take regarding restriction to pedestrians of the use of the alley which adjoins the right of way of the Illinois Central Railroad on the west between 61st place and 62d street. This alley, as your letter indicates and the records show, was platted and filed for record July 17, 1872.

You also state that on December 17, 1900, the City Council passed an ordinance restricting the use of the alley to pedestrians. On January 15, 1906, an order was passed by the City Council directing the Commissioner of Public Works to erect and maintain posts in the alley at 61st place and 62d street as physical bars to the use of the alley by vehicles.

Your letter further states that these posts have been removed and the owner of the property abutting upon this alley on the west has announced his intention to seize and hold that part of the alley adjoining his premises under the claim of abandonment, alleging that it had been used exclusively as a passage for pedestrians for a number of years, contrary to the purpose for which it was dedicated.

Let us say there is nothing in the contention of the abutting property owner that the City has abandoned the alley. The said abutting property owner's attempt to take possession of any part of the alley adjoining his premises is unauthorized.

We would advise you to follow up the order of the City Council passed January 15, 1906, directing you as Commis-

sioner of Public Works to erect and maintain posts in the alley at 61st place and at 62d street as physical bars to the use of the alley by vehicles and consequential protection for the pedestrians. The records of the Council Proceedings do not show that the above order has ever been rescinded and, therefore, is in full force and effect.

Yours very truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Proximity of Lodge Hall to Church—Construction of Amusement Ordinance.

November 17, 1923.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

We are in receipt of your letter in which you inquire whether the provision of the code relating to exclusion of amusements from close proximity to a church applies in the case of lodge halls which are not to be used for purposes of amusement but only for lodge meetings and other lodge purposes.

The paragraph of The Chicago Municipal Code of 1922 which is to be construed is in Section 190 and reads as follows:

“(a) None of the foregoing twenty-two classes of entertainments shall be produced, offered, presented or carried on in any building not now devoted to such purposes (unless such building was designed, constructed and intended to be used for such purposes prior to the first day of January, A. D. 1910) within two hundred feet of any church, hospital or building used exclusively

for educational purposes, said distance to be measured between the nearest point on the building within which it is proposed to produce, offer, present, or carry on, such entertainment or entertainments and the nearest point on such church, hospital, or building used exclusively for educational purposes."

By the words "foregoing twenty-two classes of entertainments" is meant the entertainments listed in Section 176, which classifies "all theatricals, shows and amusements offered, operated, presented or exhibited for gain, or for admission to which the public is required to pay a fee."

It is obvious that the proceedings in lodge halls are not such amusements or entertainments as are included under the classification referred to. To include lodge halls it would be necessary to extend the definition by implication. This cannot be done where an ordinance is clearly in derogation of common law rights, as in the case of limitation of uses to which land and buildings thereon may be put.

Statutes and ordinances in derogation of common law, like penal statutes and ordinances, must be strictly construed. (36 Cyc. 1179; *McNamar v. Cohn*, 115 Ill. App. 31.)

Lodge halls therefore cannot be excluded from the neighborhood of a church under the ordinance in question.

Yours very truly,

LEON HORNSTEIN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Publication of Newspaper Containing Indecent News Matter.

November 17, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You forwarded to us a copy of a paper called "Chicago Star," with a request for an opinion as to the legality of the

publication of the matter contained therein. On this we submit the following:

The paper in question purports on its face to be a newspaper. On its editorial page the paper describes itself as a "fearless independent weekly devoted to printing the whole truth," etc.

Most of the space is taken up with descriptions of the vilest practices and conditions, and what appear therein as items of news (if they actually happened) were of a character that reputable newspapers had suppressed. In fact, of the 32 columns appearing under date of November 11, 1923, it will probably be hard to discover as much as a single column that was printed in any form as news matter in any other newspaper.

The poster-sized headings on the first page are "Hotel Siren Seized," and "Massage Parlors Are Dens of Vice," and the smaller headings are in keeping with these or even more suggestive, and in some cases flagrantly indecent. So far as the writer has examined the text the alleged news items are written up in a way that approaches as near the obscene as can be done without using obscene words, and every part of the paper is devoted to reading of a salacious character. It is clearly an indecent publication.

The statute prohibiting the selling of newspapers of an immoral nature to minors may be invoked for the purpose of suppressing the sale of this paper. (See Cahill's Rev. Statutes, Criminal Code, Ch. 38, Pars. 353-355.) Under Section 2 of this act it is unlawful to exhibit such a publication within the view, or at a place which may be within the view of a minor child. Hence, said statute probably covers the situation.

Prosecution may be had also under Section 2668 of The Chicago Municipal Code of 1922, relating to the exhibition or sale of indecent literature. Under this section a publication does not have to be actually obscene to render the publisher liable—it is sufficient if immoral or indecent—and in this respect it is broader than the statute relating to obscene

publications (Section 223 of Criminal Code). This section of the ordinance is passed in pursuance of Clause 45 of Section 1, Article V, of the Cities and Villages Act, which authorizes the City to "prohibit the sale or exhibition of obscene or immoral publications."

We therefore beg to advise you that the publication of the matter in question is unlawful, and that you have ample power to suppress its sale or exhibition on the streets.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Payment of Deputy Bailiffs for Whom No Appropriation Was Made.

November 20, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date to which you attached a copy of a communication of the Bailiff of the Municipal Court dated November 12, 1923.

The gist of the bailiff's letter is that he has employed certain men as deputy bailiffs pursuant to an order of the judges of the Municipal Court spread upon the records, that these men were put on regardless of the fact that the City Council failed to appropriate for their salaries, that they are entitled to pay for their services irrespective of the question whether the judges have the power to fix the number of deputy bailiffs and their salaries, that to further deprive them of their salaries they have earned would be a great hardship to them, and that payment should therefore be made without waiting for the final decision in the case.

You state in your letter that it will create an overdraft in the appropriation for the Municipal Court if you under-

took to pay these men, and you ask us how to proceed in the event we give an opinion to the effect that the bailiff's request can be legally granted.

Where services have actually been rendered and accepted by the City, the Law Department has always gone to the last extreme in order to find a lawful way to make payment for the same. It will, in all likelihood, do so in this case if the Supreme Court should hold that the employment of these men was improper. That is so far as we ought to be called on to express an opinion on the legal phase of the situation at this time, when the litigation is still pending.

With regard to the manner of making payment, in case the Supreme Court holds that the order of the judges made it necessary for the Council to appropriate, there will be no difficulty. Such a ruling will carry with it an order requiring the City Council to make the appropriation for the current year, and the Council will have to make the appropriation forthwith.

In the absence of an order of court directing that an appropriation be made, there are only two ways in which payment can be made by the City. One is by means of a transfer from other funds appropriated to the use of the Municipal Court, the other is through an appropriation in the next annual appropriation bill.

There is no way in which the comptroller and treasurer can legally withdraw money for this purpose from any appropriation now made or from any money in the City treasury not appropriated. It will require Council action under any circumstances.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

(Editor's Note: See *People ex rel. Egan v. Dever*, 310 Ill. 534.)

Legal Status of the Chicago, North Shore and Milwaukee Railroad in Reference to the Operation of Its Trains in the City of Chicago.

November 21, 1923.

HON. U. S. SCHWARTZ, Chairman, Local Transportation Committee.

Dear Sir:

At your request, we have investigated the legal status of the Chicago, North Shore and Milwaukee Railroad in respect to the operation of its trains in the City of Chicago.

The Chicago, North Shore and Milwaukee Railroad is a commercial railroad engaged in intrastate and interstate commerce, and is conducting a passenger and merchandise despatch, express or freight business from the City of Milwaukee to 63d street and Dorchester avenue in the City of Chicago. It operates both its passenger and merchandise despatch, express or freight trains in Chicago over the tracks and structures of the Northwestern Elevated Railroad Company (including the "Union Loop") and the South Side Elevated Railroad Company.¹ (See footnote.)

¹ For convenience of designation, the Chicago, North Shore and Milwaukee Railroad, the Northwestern Elevated Railroad Company and the South Side Elevated Railroad Company will be referred to as the North Shore Company, the Northwestern Elevated and the South Side Elevated, respectively.

We do not include in this opinion any discussion of the right of the North Shore Company to operate over the right of way of the Chicago, Milwaukee and St. Paul Railway Company from the north limits of the city to Wilson avenue, inasmuch as such discussion would require an extensive search for, and a detailed construction of the several underlying ordinances granted to or affecting the Chicago, Milwaukee and St. Paul Railway Company, or its predecessors, by municipalities which at the time such ordinances were passed, were not a part of the City of Chicago, but which have since that time been annexed to the City of Chicago. In our opinion a consideration of such ordinances is unnecessary at this time, but, if desired, can be made the subject of a further opinion.

For the extent and character of the service of the North Shore Company, see "Appendix" which was attached to the opinion when presented, but which is not printed here.

In our opinion the North Shore Company has no right:

(a) To operate a merchandise despatch, express or freight service over the tracks and structures of any of the Elevated Railroad Companies;

(b) To operate a passenger service over the tracks and structures of the South Side Elevated; or

(c) To operate a passenger service over the tracks and structures of the Northwestern Elevated *in the manner in which it has been and now is operating such service.*

The North Shore Company claims the right to operate its several kinds of service over the tracks and structures of said Elevated Railroad Companies:

(1) By grant from the City of Chicago;

(2) By authority from the Illinois Public Utilities Commission and the Illinois Commerce Commission through the issuance of certificates of convenience and necessity; and

(3) By estoppel against the City of Chicago.

We shall discuss these claims in the order named.

I.

CLAIMS UNDER GRANTS FROM THE CITY OF CHICAGO.

A: *The City of Chicago has made no grant authorizing the merchandise despatch, express or freight service conducted by the North Shore Company over the lines of the Northwestern Elevated (including the "Union Loop") or the South Side Elevated. (For the extent and character of this service as now conducted, see "Appendix" mentioned in footnote on page 474.)*

Section 7² of the ordinance of March 26, 1888, under which the Jackson Park Line of the South Side Elevated was built, is as follows:

"The rights and privileges hereby conferred are upon the further express condition that said elevated railroad shall be *exclusively used for the transportation of passengers and mails.*"

2 Special Ordinances of 1915, page 1343.

Section 5³ of the ordinance of January 8, 1894, as amended by the ordinance of January 8, 1900,⁴ (which ordinance with its amendments authorized the main line of the Northwestern Elevated from Wilson avenue to the "Union Loop," and also the Wells street side of the "Union Loop") contains the following limitation upon the use of the road:

"The rights, powers and privileges hereby granted are upon the express condition that all freight trains and other rolling stock of surface railroads shall be absolutely excluded from said elevated railroad, its tracks or right of way, and that *it shall be used for removing its general passenger trains only and for accommodating and handling passenger traffic and the mails exclusively.* * * *"

Similar provisions limiting the use of the tracks and structures to passengers and mails exclusively are found in ordinances passed October 1, 1894,⁵ October 14, 1895,⁶ and June 29, 1896,⁷ which authorized the Lake Street Elevated Railroad Company, the Union Elevated Railroad Company and the Union Consolidated Elevated Railway Company to construct the Lake street, Wabash avenue and Van Buren street sides of the "Union Loop," respectively.

The ordinance of July 1, 1907,⁸ which permitted the Chicago, Milwaukee and St. Paul Railway Company to electrify its line of railway from Wilson avenue to the north limits of the city and also authorized that company and the Northwestern Elevated to connect their tracks north of Wilson avenue contains the following limitations:

"* * * provided, however, that nothing in this ordinance contained shall ever be held, taken or construed to be a grant of permission or authority to the said Chicago, Milwaukee and St. Paul Railway Company, its successors, lessees or assigns, or to any other person, firm or corporation to carry any freight upon or over the tracks of said Northwestern Elevated Railroad Company;

3 Special Ordinances of 1915, page 1289.

4 Special Ordinances of 1915, page 1310.

5 Special Ordinances of 1915, page 1209, Sec. 4.

6 Special Ordinances of 1915, page 1371, Sec. 3, par. 3.

7 Special Ordinances of 1915, page 1379, Sec. 3, par. 3.

8 Special ordinances of 1915, page 1327, Sec. 8.

and provided, further, that nothing in this ordinance contained shall ever be held to add to or in anywise affect any of the rights of said Northwestern Elevated Railroad Company under any ordinance or ordinances heretofore granted to said company by said City of Chicago. * * *

Section 13 of the ordinance of July 17, 1908, under which the North Water Street Terminal was built not only excludes all freight cars from the North Water Street Terminal, and also from the line of railroad to which it is an extension, but further limits the use of said road to passenger trains only by the following language⁹:

“* * * and that said elevated railroad shall be used for moving passenger trains only, to which end the said company will cause its trains or cars to be regularly and systematically operated at such intervals as shall be necessary to accommodate the public. * * *

The City Council, therefore, in every ordinance under which any part of the tracks or structures of said Elevated Companies was built, over which the merchandise despatch or freight service of the North Shore Company is now being operated, *has expressly limited the use of such tracks and structures to the carriage of passengers and mails exclusively.*

B: The City of Chicago has made no grant authorizing passenger service by the North Shore Company over the tracks and structures of the South Side Elevated.

The North Shore Company claims such right under a contract, dated November 8, 1921, with the South Side Elevated. The South Side Elevated has no power to let any other company into the joint use and enjoyment of the rights and privileges it obtained by ordinances of the City of Chicago, to operate over the streets, alleys and public places, without the express consent of the City Council. Such consent of the City Council has never been requested by the company and has never been granted.

The right to construct elevated railroads in the streets, alleys and public places of a municipality, whether such right

⁹ Special Ordinances of 1915, page 1335, Sec. 13.

be called a "franchise" or a "license" is not a matter of common right, but requires a public grant directly from the State, or indirectly from the State by grant of the municipality. It is a well settled rule of law that such a grant is construed strictly against the grantee and in favor of the public. *Mills v. County of St. Clair*, 7 Ill. 197; *Chicago Terminal Transfer R. R. Co. v. Chicago*, 203 Ill. 576; *Blocki v. The People*, 220 Ill. 444; *People v. Commercial Telegraph Co.*, 277 Ill. 265; 4 McQuillin on Municipal Corporations, Sec. 1652; 3 Dillon on Municipal Corporations (5th ed.), Sec. 1233; see also cases cited below.

It is also well settled that such grants are not assignable without the consent of the public authorities. The rule, as stated in 12 R. C. L. Franchises, par. 43, is as follows:

"It is now settled by an overwhelming weight of authority that public or quasi public corporations which owe duties to the public as well as to their stockholders have no right to transfer their corporate powers and privileges and thereby disable themselves from performing their public duties without legislative authority. It is the duty of gas companies, water companies, electric companies, telegraph and telephone companies, railway companies and all similar corporations which have obtained the right to use the public streets for the erection or extension of their works to serve the public faithfully and impartially, and at reasonable rates; this is a duty the performance of which may be enforced by the courts, and unless authority has been granted by the legislature an attempted transfer of its franchise by such a corporation is wrongful."

In *People v. Commercial Telegraph Co.*, 277 Ill. 265, the court stated the doctrine as follows (p. 269):

"Whatever rights were obtained by plaintiff in error, if any, to exercise the privileges in question upon the streets and alleys of the Village of Crossville were obtained by the assignment, or attempted assignment, or transfer, of the Westfall Telephone Company by the bill of sale. It is now settled by an overwhelming weight of authority that public or quasi public corporations, such as gas companies, water companies, electric companies, telegraph and telephone companies, railway companies,

and all similar corporations which owe duties to the public as well as to their stockholders, have no right to transfer their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. (Citing cases.) * * * The decisions of this court are in harmony with the foregoing authorities in all cases where the subject has been considered. (Citing cases.) * * * Legislative authority to such a corporation to assign or transfer its property, and such a license as is here in question, is implied when the grant is to it and its successors and assigns. *People v. Central Union Telephone Co.*, 192 Ill. 307.

"The grant in the ordinance to the Westfall Telephone Company was to it, alone, and not to it and its successors and assigns, and there were no words used in the grant signifying that its successors or assigns could succeed to the rights of the Westfall Telephone Company. The grant was therefore not assignable, as the statutes of our State do not expressly authorize such a transfer." (Italics ours.)

The ordinance of March 26, 1888 (the original ordinance under which the Chicago and South Side Rapid Transit Railroad Company, predecessor of the South Side Elevated, built the Jackson Park Line to 39th street), nowhere uses any such expressions as "lessees, assignees or grantees," or any other words or phrases which would naturally be used to show a grant of power to assign or transfer.¹⁰

Furthermore Section 16¹¹ of that ordinance contains the following restrictions:

"It is expressly provided that nothing contained in the foregoing ordinance shall, in any way or manner, be construed to permit the construction or operation of said elevated railroad in any street or alley of the City of Chicago, except to cross such street or alley as herein above provided; and it is further provided that the above consent shall never in any way or manner authorize any other railroad company, or street, or horse, or dummy railroad company, to use the franchise herein above granted to said Chicago and South Side Rapid Transit Railroad Company.

¹⁰ Special Ordinances of 1915, page 1340.

¹¹ Special Ordinances of 1915, page 1346.

"And it is expressly provided, that nothing contained in this ordinance shall permit the said Chicago and South Side Rapid Transit Railroad Company to connect or operate its system with any steam surface railroad company, nor shall the right of way or tracks of said Chicago and South Side Rapid Transit Railroad Company be used by the rolling stock of any surface steam railroad, for any purpose whatsoever."

In *Wells v. Northern Trust Company et al.*, 195 Ill. 288 (decided in 1902), the receiver of the Chicago and South Side Rapid Transit Railroad Company sought to invalidate mortgages on the property of that company on the ground that they were made in violation of the limitations placed upon the company by Section 16, last above quoted. After referring to the ordinance of March 26, 1888, it is stated (p. 290):

"This ordinance was amended several times, but without changing or altering the effect of Section 16."

The court discussed the effect of Section 16 as follows (p. 296):

"The provision is for the benefit of the city, to enable it to prevent any other company from being its licensee without its express consent, and it enables the city to impose any additional lawful burdens upon any subsequent licensee that it may see fit to impose. There certainly is no prohibition herein against mortgaging the property and franchises in conformity to the statute. If such mortgage should thereafter have to be foreclosed, the purchaser at such sale would run the risk of getting the city's consent to operate the purchased property. This inclusion of the rights granted by the city ordinance in the decree of sale was inoperative as to the further operation of the road by the purchaser, as such rights were personal to the first licensee and expired when its control terminated, and if there was any error in including such rights derived from the city, it was harmless."

From subsequent ordinances it appears that the City has recognized the right of the South Side Elevated to succeed to the licenses of the Chicago and South Side Rapid Transit Railroad Company; however, there has never been any grant by the City Council of any general power to assign said li-

censes granted to the Chicago and South Side Rapid Transit Railroad Company.

In an ordinance passed March 16, 1903,¹² authority was granted to the South Side Elevated, "its successors and assigns," to construct and operate an additional elevated railroad track adjacent to and in connection with its double tracks from a point on the north line of 12th street to 43d street. It may be, therefore, that the right to operate such third track is assignable, but this will not avail to authorize the present use of the tracks of the South Side Elevated by the North Shore Company, because

(a) the North Shore Company is not a successor or assignee of the South Side Elevated (see cases cited just below).

(b) the North Shore Company is apparently not restricting its use to such third track; and

(c) the South Side Elevated in any event never procured from the City Council any right to assign its license of that portion of its right of way from Van Buren street to 12th street, or from 43d street south.

26 C. J. 1040; *Donnelly v. Vandenberg*, 3 Johns (N. Y.) 27; *Oakland R. Co. v. Oakland, etc., R. Co.*, 45 Cal. 365; *Ft. Smith Light and Traction Co. v. Kelley*, 127 S. W. 975, 980; *Brooks v. Byam*, 2 Story 525, 4 Fed. Cas. 261, 268; *Brush Electric Co. v. California Light Co.*, 52 Fed. 945, 964.

C: *The City of Chicago has made no grant authorizing passenger service as now conducted by the North Shore Company over the tracks and structures of the Northwestern Elevated.*

1. NORTHWESTERN ELEVATED ORDINANCES.

The original ordinance of January 8, 1894,¹³ authorized the Northwestern Elevated to construct its main line from the "Union Loop" to Wilson avenue but expressly provided,¹⁴

¹² Special Ordinances of 1915, page 1360.

¹³ Special Ordinances of 1915, page 1289.

¹⁴ Special Ordinances of 1915, page 1289, Sec. 5.

“* * * that it shall be used for moving *its* general passenger trains only and for accommodating and handling passenger traffic and the mails exclusively. * * *”

On June 24, 1895, said original ordinance was amended to permit the construction of the Wells street side of the “Union Loop,”¹⁵ The intention was that this portion of the line should be part of the “Union Loop” and be used by all the companies whose lines converge in the Loop District. The permission granted for the joint use of that part of the road was by the ordinance expressly limited to the Northwestern Elevated, Lake Street Elevated Railroad Company, Metropolitan West Side Elevated Railroad Company, Chicago and South Side Rapid Transit Railroad Company, and the Union Elevated Railroad Company, and said companies were authorized to enter into contracts for the joint use of the “Union Loop” by them.¹⁶

On July 1, 1895, the Northwestern Elevated, in consideration of the approval by the Mayor of said ordinance passed June 24, 1895, made an agreement with the City of Chicago in which the following language is contained:

“* * * Fourth—Except as otherwise expressly provided by said amendatory ordinance of June 24, 1895, all the conditions, restrictions, obligations and limitations contained in said original ordinance of January 8, 1894, shall continue in full force and effect against said railroad company, notwithstanding the passage of said amendatory ordinance, and shall likewise be applicable and operative against said railway company in respect to said amendatory ordinance, with like effect as if expressly set forth in said amendatory ordinance.”

Section 17¹⁷ of the ordinance passed January 16, 1905 (under which the Northwestern Elevated constructed its Ravenswood Branch), expressly limits the operation of said Ravenswood Branch and also the line of railroad to which it is an extension. Said section in part, reads as follows:

“* * * that *its* said railroad shall be used for moving *its* passenger trains only. * * *”

¹⁵ Special Ordinances of 1915, page 1298.

¹⁶ Special Ordinances of 1915, page 1305.

¹⁷ Special Ordinances of 1915, page 1321.

2. "UNION LOOP" ORDINANCES.

The ordinance of October 1, 1894,¹⁸ under which the Lake Street Elevated Railroad Company constructed the Lake Street Side of the "Union Loop," uses no terms or expressions indicating any power or assignment. The ordinances of October 14, 1895,¹⁹ and June 29, 1896,²⁰ under which the Union Elevated Railroad Company and the Union Consolidated Elevated Railway Company built the Wabash avenue and Van Buren street sides of the "Union Loop," respectively, were granted in contemplation of the joint use of the "Union Loop" by the elevated companies whose lines converged in the Loop District. Said ordinances therefore expressly provide for joint use of the "Union Loop" by the Northwestern Elevated, the Lake Street Elevated Railroad Company (whose name has been changed to Chicago and Oak Park Elevated Railway Company), the Metropolitan West Side Elevated Railway, Chicago and South Side Rapid Transit Railroad Company and the Union Elevated Railroad Company, their respective successors and assigns.

The North Shore Company, however, is not a successor or assign of any of those companies. The words "successor" or "assign" as therein used plainly meant a corporation which should take the place of any one of such companies *in toto*. It did not authorize any one or more of the companies to increase the use of the properties indefinitely by letting any other corporation into the use of the property in addition to the corporations named; in other words, by "successor" or "assign" was meant a corporation substituted for one of the named companies and not a corporation in addition to the named companies.

Grants of the character under discussion are not assignable in the absence of words making them assignable. Even when such words are contained in such a grant so as to make

18 Special Ordinances of 1915, page 1207.

19 Special Ordinances of 1915, page 1370.

20 Special Ordinances of 1915, page 1378.

them assignable, nevertheless, these words are construed to authorize an assignment of the grant *only as an entirety* and not to authorize a division of the grant into parts and the assignment of such parts in severalty. See *Ft. Smith Light and Traction Co. v. Kelley*, 127 S. W. 975, 980; *Brooks v. Byam*, 2 Story 525, 4 Fed. Cas. 261, 268; *Brush Electric Co. v. California Electric Light Co.*, 52 Fed. 945, 964; *Donnelly v. Vandenberg*, 3 Johns. (N. Y.) 27; *Oakland R. Co. v. Oakland, etc., R. Co.*, 45 Cal. 365; 26 C. J. 1040.

3. THE THROUGH ROUTING ORDINANCES OF JULY 28, 1913,²¹
AND JANUARY 26, 1914.²²

The first ordinance provides that so many of the cars of the Northwestern Elevated shall be through-routed over the tracks and structures of the South Side Elevated and vice versa, "as shall be reasonably necessary to give adequate transportation service, subject to the supervision of the City Council." Similar provisions are made with respect to the Chicago and Oak Park Elevated Railway Company and the Metropolitan West Side Elevated Railway Company. Both ordinances provide that the terms and provisions thereof shall inure to the benefit of and extend to and be binding upon "the respective successors and assigns, grantees, lessees or receivers of the said four companies."

The North Shore Company, however, can claim no rights as a successor, grantee, lessee or assignee of any one of those four companies. The language employed in the ordinances indicates that the grants ran to four companies. A corporation could, perhaps, by virtue of successorship or assignment be substituted for any one of those companies, but plainly the ordinances did not contemplate that a fifth company might by contract become entitled to participate in the privileges granted to the particular companies by the ordinances under which the elevated structures were built. (See cases above cited with respect to the requirement that assignments must be of an entirety and not of a part.)

²¹ Special Ordinances of 1915, page 1149.

²² Special Ordinances of 1915, page 1156.

4. ELECTRIFICATION ORDINANCE OF THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Prior to the passage of this ordinance the Chicago, Milwaukee and St. Paul Railway Company (hereinafter called the "St. Paul Company") had operated a passenger and freight business from the north limits of the City of Chicago to the Union Station; this division being known as the "Evanston Division."

Section 1 of the ordinance of July 1, 1907,²³ authorized the St. Paul Company to electrify that portion (hereinafter called the "north portion") of its Evanston Division between the north limits of the city and Graceland avenue (Irving Park boulevard).

Section 2 of the ordinance provides as follows: "For the purpose of operating the said line of railroad" (i. e., north portion) "in connection with the line of elevated railroad owned and operated by the Northwestern Elevated Railroad Company, * * * as a through line between the north limits of the City of Chicago and all points upon the Union Elevated Railroad, known as the 'Union Loop,' or other terminals in the south division of the City of Chicago owned or operated by said Northwestern Elevated Railroad Company * * *" authority was given to the St. Paul Company and the Northwestern Elevated, either jointly or severally, their respective successors, lessees or assigns, to construct a connection of their tracks by means of an inclined structure north of Wilson avenue.

Section 3 of the ordinance provides that when said north portion of the Evanston Division is electrified,

"* * * It may be operated by either said Chicago, Milwaukee and St. Paul Railway Company, its successors, lessees, assigns or grantees, or, with the consent of said Railway Company, by the Northwestern Elevated Railroad Company, its successors, lessees or assigns, or with like consent may be operated by them jointly. * * *"

²³ Special Ordinances of 1915, page 1321.

By this language the Northwestern Elevated was given the right to operate over the north portion of the Evanston Division of the St. Paul Company. This language also authorizes joint operation of the north portion of the Evanston Division by the Northwestern Elevated and the St. Paul Company, or the joint operation by the Northwestern Elevated and the lessee or assignee of the St. Paul Company.

Up to this point, it will be noted, there is nothing in the ordinance or in any prior ordinance authorizing any company other than the Northwestern Elevated to operate trains over the right of way of the Northwestern Elevated. However, immediately following the language last above quoted, there appears this further language in Section 3:

“* * * but in either case, passengers shall be carried through (barring accidents) from all regular stations within the present limits of the City of Chicago on said Evanston Division north of Lawrence avenue, to all stations on the line of railroad known as the ‘Union Loop,’ or other terminals of the said Northwestern Elevated Railroad in the south division of the City of Chicago, without change of cars; and in like manner carried from all stations on said ‘Union Loop,’ or other terminals of said Northwestern Elevated Railroad, in the south division of the City of Chicago, to all stations on said Evanston Division within the present limits of the City of Chicago, north of Lawrence avenue without change of cars; and such operating company or companies shall at all times provide and operate a sufficient number of suitable cars and trains to properly accommodate the traffic of said line. Unless such through service shall be provided by either or both of said companies within one year after the acceptance of this ordinance, then all the rights and privileges granted by this ordinance shall cease and become null and void.”

It is our opinion that in view of the language just above quoted, whichever company or companies operated the north portion of the Evanston Division it or they would be obliged to carry passengers from all regular stations within the present limits of the City of Chicago on said north portion of the Evanston Division north of Lawrence avenue to all stations on the “Union Loop” or other terminals of the North-

western Elevated in the south division of the city, without change of cars; and in like manner from all stations on the "Union Loop" or other terminals of the Northwestern Elevated in the south division of the city to all stations on the north portion of the Evanston Division lying north of Lawrence avenue, without change of cars.

Consequently, if the St. Paul Company (or any lessee or assignee of the St. Paul Company) were alone operating the north portion of the Evanston Division, it would be obliged to run trains over the right of way of the Northwestern Elevated, stopping at stations in the city north of Lawrence avenue and running to the "Union Loop" or other terminals of the Northwestern Elevated in said south division, and also trains running from the "Union Loop" or other terminals of the Northwestern Elevated in said south division to points in the city north of Lawrence avenue. In such case the St. Paul Company (or its lessee or assignee) being under such obligation would, of course, have the implied right to run its trains over the right of way of the Northwestern Elevated in so far as it was necessary to furnish such specifically required service.

In like manner, if the north portion of the Evanston Division were operated jointly by the Northwestern Elevated and the St. Paul Company, or by the Northwestern Elevated and the lessee or assignee of the St. Paul Company, either or both of those companies thus jointly operating the north portion of the Evanston Division, would have to provide such service to the "Union Loop," and, if such specific service were not sufficiently provided by the Northwestern Elevated it would be the obligation of the other company, thus jointly operating, to provide such specific service to the "Union Loop."

But beyond the right to operate such service so specifically required—which right arises solely by implication out of the obligation to furnish such specific service—neither the St. Paul Company nor any lessee or assignee of the St. Paul Company has acquired any right to operate trains over

the right of way of the Northwestern Elevated, south of Wilson avenue.

In other words, prior to the passage of the ordinance of July 1, 1907, no company other than the Northwestern Elevated had the right to operate trains over the right of way of the Northwestern Elevated south of Wilson avenue. Said ordinance contains no express grant to the St. Paul Company nor to any lessee or assignee of the St. Paul Company, or to any other company to operate trains over such right of way of the Northwestern Elevated. The right of any company, other than the Northwestern Elevated, to operate over such right of way of the Northwestern Elevated, south of Wilson avenue, arises by implication only out of the creation of the obligation to run a sufficient number of cars to carry passengers from all stations north of Lawrence avenue in the city to the "Union Loop," or other terminals of the Northwestern Elevated in the south division of the city, and vice versa.

A right arising out of implication from an obligation imposed by such an ordinance cannot be broader than is necessary to enable the one obliged to discharge such obligation. If the obligation is discharged by the Northwestern Elevated, then there is no right on the part of the St. Paul Company, or any lessee or assignee thereof, to operate cars over the right of way of the Northwestern Elevated.

In any event, the implied right, being limited to what is necessary to discharge the obligation, is merely a right in the St. Paul Company, its lessee or assignee, to run its cars, stopping at points in the city north of Lawrence avenue and running to the "Union Loop" or other terminals of the Northwestern Elevated in the south division of the city, or from the "Union Loop" to points in the city north of Lawrence avenue.

Grants from a city to a public utility company are to be strictly construed against the grantee. This is particularly true of grants arising by implication.

In *Mills v. County of St. Clair*, 7 Ill. 197, the court said (at page 227) :

“This is a public grant to private persons, chiefly designed to the grantors for the benefit and accommodation of the public. The rule of construction of private grants, if the meaning of the words be doubtful, is, that they shall be taken most strongly against the grantor. An opposite rule prevails in cases of grants made by a sovereign power. Where there is doubt, the construction is made most favorably for the sovereign, and most strongly against the grantee. It is, however, to be understood that this rule holds only in cases of real doubt. If the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant; if in such case, one interpretation would render the grant entirely inoperative and worthless, and the other would give it force and effect, the latter, if within the reasonable meaning of the terms employed, should be adopted. *But public grants should not be extended, by implication, in favor of the grantee beyond the natural and obvious meaning of the words employed, even if by such construction the object of the grant is utterly defeated.* This doctrine will be found to be fully recognized in the case of *The Charles River Bridge v. The Warren Bridge*, reported in 11 Peters, 420, where all the authorities on the subject are collected and reviewed.”

The judgment of the Supreme Court of Illinois was affirmed by the United States Supreme Court in *Mills v. St. Clair Co.*, 49 U. S. 569, where the court (at page 581) repeated almost verbatim the language above quoted from the decision of the Illinois Supreme Court. See also: *C. D. & V. R. Co. v. City of Chicago*, 121 Ill. 176, where the court said (at page 182) :

“The occupation of the street of a city with a railroad track is of very serious concern, as regards the public and property owners upon the street, and a permission which is set up to so occupy a public street, should plainly appear, and not be left to be derived, by doubtful implication, from the generality of language which does not unmistakably manifest the intention to give such permission.”

In *Blair v. Chicago*, 201 U. S. 400, the court said (at page 471):

"But, as we have said, the Act upon its face is ambiguous and uncertain. We must judge of it by the terms in which it is expressed. A construction can be given it which would extend all the contracts with the City for the term of ninety-nine years. On the other hand, it can be maintained, with at least equal force, that, notwithstanding the Governor's view, it affirmed the contracts as made, thus distinctly recognizing the comparatively short term of twenty-five years, for which they expressly stipulated. It must be, therefore, uncertain whether the legislators voted for this Act upon one construction or the other. *It may be that the very ambiguity of the act was the means of securing its passage.* Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. *Pierce on Railroads*, 491; *New Orleans, etc., Railroad Co. v. City of New Orleans*, 34 La. Ann. 429, 447. 'Words of equivocal import,' said Mr. Chief Justice Black, in *Pennsylvania Railroad Company v. Canal Commissioners*, 21 Pa. St. 9, 22, 'are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find their way into the enactments of the legislature.' 'The just presumption,' says Cooley, in his work on *Constitutional Limitations*, 7th ed., p. 565, 'in every such case is that the State has granted in express terms all that it designed to grant at all'; and, after quoting from the Supreme Court of Pennsylvania to the same effect, the learned author observes: 'This is sound doctrine, and should be vigilantly observed and enforced.'

"Since the decision in *Dartmouth College v. Woodward*, 4 Wheat. 518, this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount

to a contract entitled to protection against impairment by action of the state or municipalities acting under state authority. Concurrent with this principle and to be considered when construing an alleged grant of this character, is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest. The rule was laid down with clearness by Chief Justice Taney in the often-cited case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, and has been uniformly applied in many subsequent cases in this court. In *Perrine v. Chesapeake & D. C. Co.*, 9 How. 172-192, the same eminent Chief Justice, speaking for the court, said: 'The rule of construction in cases of this description * * * is this,—that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded.' In the case of the *Binghamton Bridge*, 3 Wall. 51, 75, it was said: 'The principle is this, that all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state.'

"This principle has been declared axiomatic as a doctrine of this court. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666. In *Slidell v. Grandjean*, 111 U. S. 412, 438, it is declared a wise doctrine, 'it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' " (Italics ours.)

In *Knoxville Water Company v. City of Knoxville*, 200 U. S. 22 (page 33), the court said:

"As late as *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 562, this court said: 'The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. *This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealings with legislative bodies.*' *Slidell v. Grandjean*, 111 U. S. 412, 438. We have never departed from or modified these principles, but have reaffirmed them in many cases.

"It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its power by mere implication. If by a contract or otherwise, it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

See also *People v. Commercial Telegraph Co.*, 277 Ill. 265, 271; *Mitchell v. Dakota Telephone Co.*, 246 U. S. 396, at 411-412; *Piedmont Power & Light Co. v. Graham*, 253 U. S. 193, at 194; *Southern Wis. Ry. v. Madison*, 240 U. S. 457, at 461; *Blocki v. The People*, 220 Ill. 444; 12 R. C. L., pages 194, 195; 3 Dillon on Municipal Corporations (5th ed.), Sec. 1233; 4 McQuillin on Municipal Corporations, Sec. 1652; 26 Corpus Juris, 1033.

Practical Construction by the Parties.

Such being the legal status of the rights of the St. Paul Company and the Northwestern Elevated, these companies made an agreement dated August 22, 1907, pursuant to which for approximately twelve years they have operated as follows:

All the passenger service on both the north portion of the Evanston Division and the main line of the Northwestern Elevated—including the service required from points on the north portion of the Evanston Division north of Lawrence avenue in the City of Chicago to the “Union Loop” or other terminals of the Northwestern Elevated in the south division of the City—was operated by the Northwestern Elevated. The St. Paul Company operated no passenger service within the City of Chicago on the Evanston Division. The Northwestern Elevated conducted all the passenger service that was furnished on the north portion of the Evanston Division and on its own right of way south of Wilson avenue. In operating such passenger service the Northwestern Elevated ran trains, stopping at points north of Lawrence avenue in the City of Chicago to the “Union Loop” and its other terminals in the south division of the City, and vice versa. During these twelve years, no freight or merchandise was at any time carried over any portion of the Northwestern Elevated south of Wilson avenue.

The conduct of the parties to that agreement, who were the grantees under said ordinance of July 1, 1907, is important as showing the real meaning and purpose of said ordinance. Such conduct of the parties is particularly significant in construing a claim of grant by implication. In 3 Dillon (5th ed.), page 1971, it is said:

“Where the language is ambiguous, the *practical construction* given to the franchise by the parties interested may be considered and is given much weight. *Henry v. Mason City & F. D. R. C.*, 140 Ia. 201; 118 N. W. Rep. 310. Under a grant to a railroad company of the right to maintain ‘its railroad track’ in a street, a single track only was constructed and maintained for sixteen years. It was held that on the practical construction of the grant only a single track was authorized, and that the company had no right to lay a double track.”

In 1919, therefore, neither the St. Paul Company nor any lessee or assignee of the St. Paul Company had any right to run cars over the right of way of the Northwestern Elevated south of Wilson avenue. Any such claim would have

had to be based on the ground that the service rendered by the Northwestern Elevated from points north of Lawrence avenue in the city to the "Union Loop" or other terminals of the Northwestern Elevated in the south division of the city was then insufficient.²⁴

On March 31, 1919, the St. Paul Company, with the consent of the Northwestern Elevated, entered into an agreement with the North Shore Company by which that Company succeeded to the rights of the St. Paul Company in the control and operation of said north portion of the Evanston Division, and to all the rights of the St. Paul Company under the agreement of August 22, 1907, with the Northwestern Elevated.

By another agreement of the same date between the North Shore Company and the Northwestern Elevated, the North Shore Company obtained permission from the Northwestern Elevated to operate passenger trains over the main line of the Northwestern Elevated. The North Shore Company agreed never to operate any trains stopping within the City of Chicago to take on passengers from any points within

²⁴ No additional grants to the St. Paul Company or any assignee of that Company were contained in the ordinance of July 17, 1908 (Special Ordinances of 1915, pages 1328, 1335). Section 13 provides that all trains or any rolling stock of surface steam railroads except such cars as may be operated by the St. Paul Company, its successors, lessees, assigns and grantees upon the Evanston Division "as provided for in the Chicago, Milwaukee & St. Paul Railway Company ordinance, passed July 1, 1907" shall be absolutely excluded from the line of the Northwestern Elevated. The exception made was, of course, in order to permit only such trains of the St. Paul Company to be operated over the Northwestern Elevated right of way as were authorized by the ordinance of July 1, 1907, and therefore did not in any way extend the rights of the St. Paul Company created by that ordinance. Section 5 of the 1908 ordinance expressly provides that "nothing herein contained shall change or be construed to change the terms and conditions of that certain ordinance granted to" the St. Paul Company, its successors, lessees, assigns and grantees, and the Northwestern Elevated, passed July 1, 1907. Section 18 of the 1908 ordinance provides that all obligations therein set forth shall be binding upon the successors, lessees and assigns of the Northwestern Elevated; this did not extend the grants to such successors, lessees and assigns. In any event, the North Shore Company is not such a successor, lessee or assign of the Northwestern Elevated. See cases above cited re assignments in toto.

the city to the "Union Loop" or from the "Union Loop" to points north within the city.²⁵

Pursuant to these agreements the North Shore Company is now, and for several years past, has been operating a passenger service from points without the City of Chicago to the "Union Loop" and from the "Union Loop" to points without the city, receiving and carrying no passengers, however, from any point within the city destined to the "Union Loop," and no passengers from points on the "Union Loop," to any points within the city.

Such operation of passenger service by the North Shore Company does not, in any manner, help to fulfill the obligation imposed by the ordinance of July 1, 1907, to carry passengers from points north of Lawrence avenue in the city to the "Union Loop" or other terminals of the Northwestern Elevated in the south division of the city or vice versa. The North Shore Company merely added an additional passenger service (and that an interurban service) over the right of way of the Northwestern Elevated. Such additional service was neither required nor permitted by the ordinance of July 1, 1907, or by any other ordinance relating to the tracks and structures of the Northwestern Elevated.

Because of its similarity to the situation here, we direct particular attention to the case of *City of Aurora v. Elgin Traction Co.*, 227 Ill. 485:

In 1890, the City of Aurora adopted an ordinance authorizing the Aurora Street Railway Company to construct, operate and maintain a street railway in certain streets; the use of steam as a motive power was prohibited and electricity was authorized. In 1898, the City adopted an ordinance granting to H. H. Evans, "his heirs, administrators and assigns," authority to operate a "street car line" or street

²⁵ The articles of incorporation of the North Shore Company state that "it is the intention of the company * * * to purchase, acquire, construct, operate and maintain * * * a line from Chicago, Illinois, to Milwaukee, Wisconsin." Apparently, therefore, the North Shore Company and the St. Paul Company were parallel or competing lines, and consequently, there may be some doubt as to the legality of these agreements.

railway in and along certain streets with provisions substantially the same as those of the prior ordinance above referred to. The Elgin, Aurora and Southern Traction Company became the assignee of the Aurora Street Railway Company and of H. H. Evans, and for some years operated street railways from point to point in the city pursuant to the provisions of the above ordinances. This company (hereinafter called the "Aurora Company") was also engaged in the operation of interurban lines, but its only authority from the City to operate the Fifth Street Line was derived from the ordinances above referred to.

At that time the Joliet, Plainfield & Aurora R. R. Co. (hereinafter called the "Joliet Company") was engaged in operating an interurban electric railway for the conveyance of passengers, mail, express "and other matter" from Joliet to the eastern city limits of Aurora, at the point where the Fifth Street Line of the Aurora Company reached the eastern limits of the City of Aurora. The Joliet Company was without right to pass within the city's boundaries. The Aurora Company was organized under the general Corporation Act. The Joliet Company was incorporated under the Railroad Act.

In 1904 the two companies signed an agreement whereby the Aurora Company leased the cars of the Joliet Company wherein to convey the passengers coming in on the interurban cars to points along the Fifth Street car line, and to convey passengers from points along the Fifth street line to the point of connection of the two companies at the city limits. It was also agreed that the Aurora Company should carry to and from said point of connection, express, mail or other matter destined to or from points on the lines of the Joliet Company, "so far as it shall be able to do under municipal or statutory ordinances or regulations."

Shortly after the making of this agreement a resolution was adopted by the City Council instructing the Mayor to take the necessary steps to prevent the companies from carrying into effect this agreement. The companies thereupon filed a bill to enjoin such action by the City. A temporary injunc-

tion was entered and made perpetual. On appeal this decree was reversed and the cause remanded with instructions to dissolve the injunction and dismiss the bill. The court said (page 497):

“The Appellate Court declared the contract did not confer lawful authority on the Joliet company to transport freight, express, baggage and mail in its cars along the street car tracks of the city. This holding was right, because the license and charter of the Aurora company are not broad enough to authorize the Aurora company to confer power on the Joliet company to transport baggage, freight, express and mail through the streets of Aurora. We think the same reasoning ought to be given application with respect to the authority granted to the Aurora company by charter and ordinances to operate its street cars and carry passengers on the Fifth street line. That authority is not broad enough to empower the Aurora company to confer upon the Joliet company the right to transport its passenger cars and passengers over the line in question.

“An ordinance granting the privilege to a street railway company to lay its tracks and operate its cars in the city is always to be strictly construed in favor of the public and against the licensee. Nothing passes by mere implication against the public, and that which is not unequivocally granted is withheld. (Citing cases.)

“The license to the Aurora company cannot be assigned by it so as to invest the Joliet company with power to operate the passenger traffic of a commercial railroad or interurban railroad through the streets of the City of Aurora.”

After this statement, the court discussed the question whether, under the provisions of the Railroad Act authorizing traffic agreements and leases, this agreement could be made. The court said (page 499):

“In *City of Chicago v. Evans*, 24 Ill. 52, it was held that two horse railways might, under the quoted sections, unite their roads and make running arrangements with each other, but the fact is there pointed out that the two roads were ‘created for the same purpose.’ It also appears that both were operating in the same city, and that each had permission from the municipal authorities to

operate a street railway in the streets of the city. Appellee roads were not created for the same purpose, were not operating in the same city, and but one of them had permission from the City of Aurora to engage in operating a street railway in the streets of that city. We do not think the case just referred to determines the question of their right to enter into this contract. A street railway is not an additional burden upon the street of a city, while a commercial railroad is a further burden upon such way. (*Wilder v. Aurora, DeKalb and Rockford Traction Co.*, 216 Ill. 493.) It follows that a street railway company may not lawfully carry the cars of a commercial railroad for the purpose of transporting therein the passengers of the latter over the lines of the street railway without the permission of the city authorities of the city in which the lines in question are located. If it were otherwise, the power to determine when, where and in what manner interurban lines should enter a city and traverse its thoroughfares with passenger traffic would be lodged, in great part, not in the city authorities but in the street railway company in every city where a street railway company is rightfully operated.

"It is said, however, that the sections of the statute just quoted entered into and became a part of the ordinances passed by the City of Aurora under which the Aurora Company now operates its street railway, and consequently, by such ordinances, the city authorized the Aurora company, as the successor of those to whom the ordinances originally ran, to grant unto the Joliet company the right to propel its passenger cars, or have them propelled, over the lines of the street railway. We think this position untenable. Not infrequently private individuals own the fee in the streets. In such instances the owners are not in any way damnified by the construction of a street railway in the streets, but operating a commercial railroad in the streets is an additional servitude upon the fee. Now, following the reasoning of the appellees, if the ordinance and the statute enable the street railway company to authorize the commercial railroad company to use the lines of the street railway over which to operate its cars without the permission of the city, it would seem that the ordinance and statute so enable the street railway company to confer such right without any reference to the objections of private individuals who may own the fee of the streets, and it would seem, in that event, that such individuals would be with-

out recourse. The law is not so. Where a corporation chartered to operate an interurban railroad desires to enter a city of this State and propel cars in and along the streets of the city for the purpose of transporting its passengers or freight into the city it must seek and obtain a license to do so from the city, subject to such reasonable rules and regulations as the municipality may find it necessary or proper to establish." ²⁶

In our opinion the North Shore Company, at most, has acquired whatever rights to operate within the City of Chicago, over the right of way of the Northwestern Elevated, were vested in the St. Paul Company and no more. Such right is an implied right only of the character above described. This right the North Shore Company is not now exercising. Moreover, by express contract the North Shore Company has agreed not to exercise it. The present operation of the passenger service of the North Shore Company over the right of way of the Northwestern Elevated south of Wilson avenue is, therefore, entirely outside of any grant from the City of Chicago and, in our opinion, is improper and unlawful. NOTE ²⁷

²⁶ In this case the Aurora Company was organized as a street railway under the general Incorporation Act and the Joliet Company was organized under the Railroad Act. In the case of the Northwestern Elevated and South Side Elevated, these Companies, although organized under the Railroad Act, have restricted themselves to the carriage of passengers only, and such restrictions are binding upon them. (See *Lieberman v. Chgo. R. R. Co.*, 141 Ill. 140.)

In *Barsaloux v. City*, 245 Ill. 598, 605-607, the court said (discussing the *Lieberman* and other similar cases) makes it clear that it adheres to the rule that for most purposes there is no distinction in law between the use of the surface of the streets by street railways and the use of the portion of the streets above the surface, in a city, by corporations organized under the Railroad Act; the court stated (p. 607) that the words "Street Railways" as used in the *Mueller* law applied to such elevated railroads.

²⁷ February 15, 1923, the Law Department of the City gave an opinion pertaining to the rights of the North Shore Company to operate its cars over the Northwestern Elevated or other elevated lines south of Wilson avenue. (Opinions of the Corporation Counsel, etc., from January 1, 1920, to April 15, 1923, page 825.)

From the opinion it appears that on November 23, 1922, the City Comptroller asked whether or not the North Shore Company "is obliged to pay any compensation to the City of Chicago."

The opinion states that the City has never passed any ordinance granting to the North Shore Company the right to operate its cars

II.

THE NORTH SHORE COMPANY ACQUIRED NO RIGHTS AS AGAINST
THE CITY OF CHICAGO UNDER OR BY VIRTUE OF THE
CERTIFICATES OF CONVENIENCE AND NECESSITY
ISSUED BY THE ILLINOIS PUBLIC UTILITIES
COMMISSION IN 1919 OR THE ILLINOIS
COMMERCE COMMISSION IN 1921.

The North Shore Company claims that it has the right to conduct its passenger and merchandise despatch, express or freight business in the City of Chicago by reason of two certificates of convenience and necessity; the first having been issued by the Public Utilities Commission under date of May 28, 1919, and the second by the Illinois Commerce Commission under date of November 2, 1921.

or trains over any of the city streets, alleys or public places, or over the right of way of the Northwestern Elevated, the "Union Loop" or South Side Elevated within the city limits. Nor has the City passed any ordinance relative to the payment of any compensation by said Company to the City for the operation of its cars anywhere within the city limits.

The opinion then proceeds as follows:

"The North Shore Company within the city limits operates its cars or trains of cars over and upon the rights of way of the Northwestern Elevated, the Union Loop and the South Side Elevated, *'pursuant to certificates of convenience and necessity issued by the Illinois Commerce Commission or its predecessor, and, by virtue of a direct contractual relationship between the said elevated railroad companies and itself.'* (Italics ours.)

"The original franchise ordinances or the amendments thereto, passed by the Council of the City of Chicago and accepted by the elevated companies provided for the operation of cars and trains of cars *'other than those belonging to said companies'* so that this office is of the opinion that said companies were acting strictly within the exercise of their rights when they contracted with the * * * North Shore Company for the operation of the latter's cars or trains of cars over the rights of way of the elevated railroad companies, so far as the City of Chicago is concerned."

The words *"other than those belonging to said companies"* are set in the opinion in quotation marks and in italics. As thus printed they indicate that the language is taken from the original franchise ordinances or the amendments thereto, passed by the Council of the City of Chicago and accepted by the elevated railroad companies.

We have carefully examined the ordinances but have been unable to find any such language. We are unable to concur in this opinion as to the rights of the North Shore Company. (See copy of said opinion in "Appendix" to this opinion.)

The first of these certificates purported to authorize the North Shore Company to operate its passenger trains over the main line and into the North Water Street Terminal of the Northwestern Elevated and over the "Union Loop" and the South Side Elevated to 12th street under certain conditions named in, and pursuant to the terms of, an agreement entered into between the North Shore Company and the Northwestern Elevated, dated March 31, 1919, and consented to by the South Side Elevated, which agreement was expressly approved by said order of the Public Utilities Commission.

The second of the certificates of convenience and necessity above referred to purported to authorize the North Shore Company to operate its trains "(1) upon and over the tracks of the Main Line and into the North Water Street Terminal (if and when adapted for the purpose) of the Northwestern Elevated, and to and upon the Union Loop for the carriage and the carriage by the North Shore Company of merchandise by despatch service, express matter, newspapers, mails, packages, milk and produce, as provided in the agreement between the North Shore Company and the Northwestern Elevated of March 31, 1919, such service to be in connection with, and a part of the through carriage by the said North Shore Company of merchandise by despatch service, express matter, newspapers, mails, packages, milk and produce; (2) upon and over the tracks of the South Side Elevated from the Union Loop to 63d street and Dorchester avenue, on the Jackson Park Line, for the carriage and the carriage by the North Shore Company of passengers; (3) upon and over the tracks of the South Side Elevated from the said Union Loop to 63d street and Calumet avenue, on the Jackson Park Line, for the carriage and the carriage by the North Shore Company of merchandise by despatch service, express matter, newspapers, mails, packages, milk and produce, all of said service to be in connection with and a part of the North Shore Company's through service." And the order expressly approved and authorized the execution of an agreement which was entered into November 8, 1921, between the North Shore Company, the Northwestern Elevated and the South Side Ele-

vated, providing for the operation by the North Shore Company of its trains over the lines of the South Side Elevated above described.

It is not claimed that the City Council of the City of Chicago took any action authorizing or concurring in the issuance of these certificates of convenience and necessity. It is recited in the first of the two certificates, "that the City of Chicago did appear by its attorney and offered no objection to said contracts and leases but stated that upon investigation of said leases and contracts it could find nothing objectionable to the interest of the public or the City in said leases and contracts or their terms and provisions." And the second of the two certificates recited that at the hearing on the petition "Chester E. Cleveland and Daniel A. Roberts appeared as counsel for the City of Chicago" and the Commission made a finding to the effect "that no opposition or objection to the service sought by said petition has been offered by the City of Chicago nor any of the corporate parties interested."

The giving of notice to the City of Chicago of the pendency of the proceedings before the Commission and the appearances entered on behalf of the City and the approval expressed by its representatives indicate that both Commissions were fully aware of the importance to the municipality of the matters pending before them and took such steps as seemed to them proper to give the City of Chicago an opportunity to protect its interest. As we shall hereinafter point out, in the absence of appropriate action by the City Council, the appearance of counsel before the Commission and the acquiescence of such counsel in the Commission's entry of those orders were of no force or effect and for the purpose of the present discussion can be altogether ignored.

We do not understand that it has ever been the view of either of the commissions that the issuance of a certificate obviates the necessity of obtaining a municipal franchise permit or consent to operate in any public street. Reservations have been embodied by the commissions in numerous certifi-

cates authorizing the construction or operation of street and electric railroads within the confines of a municipality and providing that they would become operative only when the necessary municipal authority had been obtained. For instance, application was made to the Illinois Commerce Commission in case No. 12055 by this same North Shore Company (under the name of North Shore Connecting Railroad) for a certificate of convenience and necessity to change its right of way through the northern part of the City of Evanston. The Commission on January 3, 1923, entered an order that such a certificate should issue and in the order stated:

"Of a certainty any order issued by this Commission granting a certificate of public convenience and necessity to the North Shore Connecting Railroad must be considered in relation to the powers of the corporate authorities in the local municipalities. * * * *The petitioner herein has stated its position to be that it has never contended, and does not now contend, that it is not necessary since the enactment of the Illinois Commerce Act to obtain the consent of the proper municipal authorities before it can cross streets intersecting its route within the municipality; and further that it disavows any intention to lay tracks across such streets without the consent of the corporate authorities of the City of Evanston. This Commission has no intention of usurping or overriding the power of any local municipality. The City of Evanston can have an immediate and effective remedy before the courts should any of its rights or authority be disregarded by the petitioner.*" (Italics ours.)

And the final paragraph of the order reads:

"IT IS FURTHER ORDERED by the Commission that *this certificate of public convenience and necessity shall become effective when the petitioner, the North Shore Connecting Railroad shall have complied with all legal requirements authorizing them to operate a railroad along the route herein designated.*" (Italics ours.)

The above portion of the opinion of the Illinois Commerce Commission expresses so clearly the law in this regard that we copied the opinion in full in the "Appendix" which we attached to this opinion, as noted on page 474. See also *Belke v. Baltimore and Ohio Terminal Railroad Company*,

P. U. R. 1920 E. 500; *Re St. Lawrence, St. Louis, Springfield & Peoria R. R.*, P. U. R. 1923 B. 422.

As we understand the claim of the North Shore Company, it is, that even without any action on the part of the City Council, the commissions had full jurisdiction of the matters presented in the above-mentioned proceedings and that these certificates were equivalent to the granting to the North Shore Company of a franchise to operate its trains in the City of Chicago in a manner, which, we will assume for the purpose of this opinion, is substantially the manner in which such trains are now operated. Such certificates contain no limitation as to time and would therefore amount (if the claim of the North Shore Company is sustained) to perpetual franchises subject only to the following reservations found in said orders of the commissions. The first of these orders contains a reservation to the effect that:

“The Commission expressly reserves jurisdiction over the parties and subject-matter for the purpose of making any orders which it is, or may be authorized by law to make in the regulation of the utility companies, parties hereto, and of modifying this order from time to time as the public interest may require, and the parties by accepting and acting under said agreements shall be deemed to have assented to the conditions upon which this approval is made.”

And the second of said orders contains the following reservation:

“The approval of the said agreement” (referring to the above-mentioned agreement between the North Shore Company, the Northwestern Elevated, and the South Side Elevated, dated November 8, 1921), “herein given is subject to the right of this Commission to terminate the same, upon reasonable notice, and hearings thereon, when public interest or convenience requires such termination.”

These certificates of convenience and necessity would also amount (if the claim of the North Shore Company is sustained) to the grant of a franchise for the conduct of a totally new class of service, viz.: merchandise despatch, express

or freight service, over the tracks and structures of the Northwestern Elevated, the "Union Loop," and the South Side Elevated (the use of which had been limited by the ordinances of the City of Chicago to passenger service only), without the securing of any frontage consents from the abutting property owners. Such frontage consents must be obtained and a new franchise granted before any right to conduct such a new class of service could have been obtained from the City of Chicago. Without such new frontage consents the City Council could not have granted the right to conduct this new class of service and any attempted grant by the City Council would, without such frontage consents, have been null and void.

McCartney v. C. & E. R. R. Co., 112 Ill. 611.

City of Aurora v. Elgin Traction Co., 227 Ill. 485.

C. B. & Q. R. R. Co. v. Abens, 306 Ill. 69.

Under the claims made by the North Shore Company in this case the question is squarely presented whether these certificates of convenience and necessity can take the place of franchises granted by the City Council. In our opinion they cannot and we hold that these certificates of convenience and necessity confer no rights whatsoever on the North Shore Company to operate its trains in or across the streets or other public places in the City of Chicago.

(a) *Long prior to the passage of the first public utility act it was the well established public policy of this State to require the consent or permission of a municipality before either a street or commercial railroad could lay its tracks or operate its trains either along or across the streets or other public places in such municipality.*

Such public policy, so far as street railways are concerned, was evidenced by the Constitution itself, Section 4 of Article XI, providing:

"No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town or incorporated village, without requiring the consent of the local authorities having

the control of the street or highway proposed to be occupied by such street railroad.”

A similar rule is laid down with reference to commercial railroads in the General Railroad Law of 1872, which provides in Section 19:

“Every corporation formed under this Act shall, in addition to the powers hereinbefore conferred, have power: * * * Fifth—To construct its railway across, along or upon any * * * street, highway * * * which the route of such railway shall intersect or touch; * * * nothing in this Act contained shall be construed to authorize * * * the construction of any railroad upon or across any street in any city, or incorporated town or village, *without the assent of the corporation of such city, town or village.* * * *” (Cahill’s R. S. 1921, p. 2764.)

Provisions found in the Cities and Villages Act of 1872 contain, among the grants to the City Council, several provisions hereinafter referred to more at length, which recognize the same public policy and vest in the City Council exclusive jurisdiction over the use of the streets by either a street or electric railroad company.

It would unduly extend this opinion to enumerate all of the statutes and court decisions in which this public policy has been emphatically declared. Among the more dramatic manifestations of such public policy was the opposition to the Humphrey Bills in 1897 and the repeal of the Allen Law in 1899. A review of Illinois legislation and judicial decisions in this connection is found in the case of *Blair v. Chicago*, 201 U. S. 400, in which the Supreme Court of the United States passed on the claims of the street railway companies under the so-called “99-Year Act.” In that case the court said (p. 462):

“It thus clearly appears, at least up to the passage of the Act of 1865, that legislation upon the subject recognized and enforced *the right and authority of the City* to fix the term during which the streets might be occupied by street railway companies. * * *”

(p. 465) :

*“To give this Act the construction insisted on by the companies is inconsistent with the policy of the State declared in the Act of 1859 which ratified the ordinance of 1858 and gave additional rights in the streets only upon obtaining the consent of the City. * * *”*

(p. 467) :

*“But in 1865 the policy of local control of the streets for railway purposes had been declared and acted upon. So radical a departure as is contended for must be found in terms plainly stated and clearly defined. * * *”*

(p. 469) :

*“This construction is in harmony with the policy of the State, as evidenced in its prior legislation on the subject, and, in the earlier part of the section under consideration, it gives some meaning to all parts of the Act, and makes its provisions consistent with each other. It preserves local control of streets for railway purposes, which the legislature, in all of the acts under consideration, has sought to protect. * * *”*

(p. 470) :

*“This Act shows a consistent policy of local control and is inconsistent with the theory of a grant already made for the use of the streets for 99 years. * * *”*

In this connection see *City of Aurora v. Elgin Trac. Co.*, 227 Ill. 485, above quoted at length.

(b) *The acts creating the Public Utilities Commission and the Illinois Commerce Commission did not repeal the statutes giving municipalities jurisdiction over the use of their streets. On the contrary, such public utility acts, and especially the later one, expressly recognized that the statutes conferring power upon municipalities were still in full force and effect.*

The act creating the Public Utilities Commission and the later act creating the Illinois Commerce Commission both contained express provisions as to the statutes which were thereby repealed. Neither the Cities and Villages Act con-

ferring power upon the city council for the regulation of streets and other public places nor the General Railroad Act requiring the consent of the municipality to any street crossing by a commercial railroad were mentioned in either of the public utility acts as being repealed or modified. The express repeal of certain acts implies an intent not to repeal other acts.

Meese v. No. Pac. Ry. Co., 211 Fed. Rep. 254, 262.

The act creating the Illinois Commerce Commission contains in Section 81 the following express proviso:

"Nothing in this Act shall be construed to limit or restrict powers now or hereafter granted to cities to pass ordinances for the protection of the public health, safety, comfort, and general welfare or governing the regulation, control or occupation of streets, highways and public property within the city." (Cahill's R. S. 1921, page 2735.)

It is to be noted that this act, from which alone the Illinois Commerce Commission derives its powers, was approved June 29, 1921, and went into effect July 1, 1921, and that on same day an act (passed on the prior day, June 30th) also became effective, which re-enacted in identical language the clauses in Article V of the Cities and Villages Act vesting in the City Council full control over streets and alleys, such as Clauses Seventh, Ninth and Tenth, and specifically conferring upon the City Council authority over street and electric railroad companies, such as Clauses Twenty-fourth, Twenty-fifth and Ninetieth.

In 1919 the legislature had in similar manner re-enacted the provisions of Article V concerning the powers of the City Council but in that act a significant change was made in Clause Twenty-fourth so as to make it include an *electric* railroad. That clause now vests in the City Council under the terms of the 1919 and 1921 acts power "to permit, regulate or prohibit the locating, constructing or laying a track of any horse or electric railroad in any street, alley or public

place; but such permission shall not be for a longer time than for twenty years.”²⁸

Clause Ninetieth—the “frontage consent” clause—since its amendment in 1887 has provided:

“The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the State, now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile, if any, in excess of the whole miles, measuring from the initial point named in such petition, of such street or of the part thereof sought to be used for railroad purposes.”

This provision which is expressly made applicable to an electric railroad such as the North Shore Company (incorporated, as it is, under a general law of the state), has therefore been enacted and re-enacted by the legislature at different times down to and including June 30, 1921, the day after the Illinois Commerce Commission Act was enacted.

The re-enactment of these clauses is the clearest possible declaration on the part of the legislature that they are still in full force and effect and are not modified or changed by the terms of the Illinois Commerce Commission Act passed contemporaneously therewith. It is the duty of the courts

²⁸ Under the Barsaloux case (245 Ill. 598) it would appear that elevated railroads, such as the North Shore Company, are “street railways” under the terms of the Mueller Act passed in 1903. That Act expressly provided, “Nothing in this Act contained shall be construed to authorize any city to make any street railway grant * * * for a period exceeding twenty (20) years * * *.” It may therefore be doubted whether some of the grants to elevated companies made after 1903 are binding for a period of more than twenty years from the dates of such grants.

to construe these two acts together and to reconcile them if possible.

Tudor v. Chicago & So. Side Rapid Transit R. R. Co., 154 Ill. 129.

Stephens v. C. B. & Q. R. R. Co., 303 Ill. 49.

It was held in the last named case that acts passed at the same session of the legislature must be construed together as one statute so far as they relate to the same subject-matter. This case also approves the general rule of Illinois and other courts that general language in one statute must be construed as being limited by particular language in another statute (whether earlier or later) which is inconsistent with it in order that both may be given effect.

People v. Rose, 166 Ill. 422.

C. & N. W. Ry. Co. v. Chicago, 148 Ill. 141.

United States v. Chase, 135 U. S. 255.

Rodgers v. United States, 185 U. S. 83.

United States v. Lapp, 244 Fed. 377.

Cook County National Bank v. U. S., 107 U. S. 445.

Townsend v. Little, 109 U. S. 504.

Especially where, as here, there has been a public policy long established by prior legislation, a later statute will not be held to repeal or modify the earlier statute unless such intent is clearly expressed. In *Fussell v. Gregg*, 113 U. S. 550, at page 565, the court said:

“It is most unreasonable to suppose that Congress intended, by doubtful inference, to repeal the salutary provision of Section 4 of the Act of 1804, which in numerous enactments, it had cautiously preserved for a period of 76 years, and on which the titles to a vast domain rested.”

In *Federal Statutes Annotated*, Vol. 1, p. 75, it is stated:

“Legislative policy clearly deducible from the consistent legislation of Congress is a legitimate factor in determining the meaning of subsequent acts open to construction,”

citing among other cases *Richardson v. Harmon, Receiver*, 222 U. S. 96.

It therefore appears that there has been no repeal of the provisions either of the Cities and Villages Act or of the General Railroad Act vesting power in the municipality over the use of its streets, and further that the specific provisions contained in those acts requiring the consent of the municipality before any street or electric railroad company can occupy the streets have not been in any way changed by the passage of the public utility acts. Indeed it has been expressly decided in the case of street railways that such is the law. In *City of Chicago v. O'Connell*, 278 Ill. 591, which dealt with the powers of the Public Utilities Commission it is expressly stated (p. 601) that:

"the Constitution has conferred upon the City the power to determine whether street railways shall be operated upon the streets of the city, and if so upon what streets,"

and in *Hoyne v. Chicago & Oak Park Elevated R. R. Co.*, 294 Ill. 413, it is stated, at page 418:

"This provision" (referring to the constitutional provision above quoted) "simply requires the consent of the municipal officers to the construction and operation of a street railway and that no law shall be passed granting such right without such consent."

It is, to be sure, true that in the *Hoyne* case the Supreme Court held that this constitutional provision did not apply to the construction or operation of a commercial railroad, such as the North Shore Company, but if the contention now made by that company should be sustained as to the proper interpretation to be placed upon the public utility acts then it would appear that the Public Utilities Commission formerly had, and the Illinois Commerce Commission now has, authority to grant franchises within the City of Chicago not only to such commercial railroads but also to companies operating street railways. Neither of the public utility acts makes any distinction in this regard between commercial railroads and street railways. If the interpretation urged by the North

Shore Company is the correct one then it must be held that the legislature intended to confer upon the Commissions power to grant franchises to street railways as well as to commercial railroads. Since prior to the passage of the Illinois Commerce Commission Act, the Supreme Court had held in the *O'Connell* and *Hoyne* cases that the legislature could not under the Constitution confer such powers with respect to street railways, it must be presumed that the legislature in passing that act had no such intention, and therefore the interpretation for which the North Shore Company contends must be incorrect.

In cases decided after the passage of the first public utility act, reference is made by the Supreme Court to the necessity of a municipal franchise. In *Central Illinois Public Service Company v. Schwartz*, 284 Ill. 108, the court said (p. 112):

"The appellant has no franchise but that granted the State, *though it can exercise this franchise within the city only by virtue of the permission evidenced by the ordinance*, just as the permission of any private owner is necessary to the exercise of the franchise on his property." (Italics ours.)

This language was quoted with approval and followed in *City of Sullivan v. Central Illinois Public Service Company*, 287 Ill. 19. (See also *C. M. & St. P. Ry. Co. v. Franzen*, 287 Ill. 346, 358.) (In the above quotation from the opinion of the Supreme Court the word "franchise" is used as it is sometimes in the decisions as referring to the franchise creating a corporation granted by the State rather than as the municipal grant to conduct business within the limits of the municipality.)

Chicago & Southern Traction Co. v. I. C. R. R. Co., 246 Ill. 146, dealt with the powers of the former Railroad Commission (which preceded the first public utilities commission in this State) and the possible conflict between such commission and the City of Harvey concerning the crossing of an electric commercial railroad and a steam railroad within the corporate limits. The court said (p. 155):

“* * * it cannot be said, however, that the Act of 1889” (creating the Railroad and Warehouse Commission) “in any measure takes from municipal corporations the right to control their streets. *It does not vest the control of any streets in the Railroad and Warehouse Commission.* Under its provision the Railroad and Warehouse Commission is required, in proper cases, to designate the place where and the manner in which one railroad shall be allowed to cross the main line of another.

* * * The City of Harvey had the authority to refuse to allow appellant to lay its tracks along 157th street unless the same should be laid at the street grade the entire length of that street, including the point of crossing the main line of appellee. * * * If the City of Harvey would permit no other crossing except one at grade to be made at this point by appellant over the main line of appellee, then the only alternative open to appellant, upon a holding of the Railroad and Warehouse Commission that a crossing at grade would not be permitted, would be to select some other point of crossing, whether it be upon some other street of the City of Harvey, with the consent of the municipality, or elsewhere.” (Italics ours.)

The effect of this decision was to reaffirm the control of the City of Harvey over its streets and its right to deny permission to this electric railroad to cross a steam railroad in the manner prescribed by the Railroad and Warehouse Commission. *In the same way under the later acts creating the Public Utilities Commission and the Illinois Commerce Commission the municipality certainly retains jurisdiction over its streets in such a manner as to authorize it to refuse permission to a street railway or commercial railroad to occupy its streets and operate its trains therein.*

(c) *The act creating the Public Utilities Commission and the act creating the Illinois Commerce Commission both recognized that a “franchise, license, permit,” etc., is to be granted by the municipality and that the Commission has no authority to grant such privileges as are ordinarily contained in such “franchise, license, permit,” etc.*

There are numerous references to "franchises" in these acts of the legislature and the word as there used clearly refers to grants by municipalities.

Section 29 of each act provides:

"No franchise, license, permit or right to own, operate, manage or control any public utility shall be assigned, transferred or leased nor shall any contract or agreement with reference to or affecting any such franchise, license, permit or right be valid or of any force or effect whatsoever, unless such assignment, lease, contract, or agreement shall have been approved by the Commission. *Such permission shall not be construed to revive or validate any lapse or invalid franchise, license, permit, or right, or to enlarge or add to the powers and privileges contained in the grant of any franchise, license, permit, or right, or to waive any forfeiture.*" (Italics ours.)

It is obvious that if the Commission has not the authority "to enlarge or add to the powers and privileges contained in the grant of any franchise," etc., or "to revive or validate any lapsed or invalid franchise," it could not possibly have the authority to grant a new franchise or to confer upon a public utility within a municipality rights such as are usually embodied in a municipal franchise. Conversely, if the Commission had the power which the North Shore Company claims it has, to issue certificates which would be equivalent to, and in lieu of, franchises, then it could, of course, "enlarge or add to the powers and privileges" contained in any existing franchise or "revive or validate any lapsed or invalid franchise."

The above, as well as numerous other provisions in both acts, such as those defining a public utility in Section 10, and those referring to the transfer of franchises in Section 28, clearly imply that the "franchise, license, permit," etc., there referred to is one granted by a municipality and that certificates of convenience and necessity which the Commission is authorized to issue are effective within municipal limits only when granted to companies already possessing or thereafter acquiring the requisite municipal franchises.

(d) *The special provisions in the public utilities acts relied upon by the North Shore Company did not confer any such power on the Commissions as is claimed by the North Shore Company. These provisions authorize the Commissions to order the joint use of tracks, etc., when located in or across the streets of a municipality only in the event, and upon the condition, that proper municipal permission or consent has been or shall be obtained.*

The North Shore Company relies upon Sections 44, 46, 48, 50 and 55 of the act creating the Public Utilities Commission and the corresponding sections of the later act creating the Illinois Commerce Commission. In the main, and with the exceptions hereinafter specially noted, the sections in the two acts are identical.

That the Public Utility Act in force in 1919 and prior thereto could not be construed as having divested the municipal authorities of control over the occupation of the streets is conclusively demonstrated by the fact that in 1919—some six years after the passage of the first public utility act—the legislature amended Clause 24th of Section 1 of Article V of the Cities and Villages Act by inserting the word “electric” therein so that said clause was made to read as follows:

“The City Council in cities * * * shall have the following powers: * * * Twenty-fourth. To permit, regulate or prohibit the locating, constructing or laying a track of any horse or *electric* railroad in any street, alley or public place; but such permission shall not be for a longer time than for twenty years.” (Italics ours.)

The legislature by this amendment plainly declared its recognition of the fact that the City Council had not been divested of its control over the occupation of the streets and that such control had not been transferred to the Public Utilities Commission.

The legislature by such amendment also made known its intention to continue this control in the City Council.

The 24th Clause (as so amended in 1919) as well as all the other similar clauses in the Cities and Villages Act was

re-enacted in 1921 and the sections of the Public Utilities Act relied on by the North Shore Company have not (with the immaterial exception hereinafter noted) been changed since 1919. It follows therefore that the control over the occupation of the streets has not been transferred by the legislature from the City Council to the Illinois Commerce Commission. Further examination of the particular sections relied on by the North Shore Company confirms the views above expressed.

These sections are found in the portion of the act dealing in general with steam and other railroad companies throughout the state and are not made specially applicable to railroads located within municipalities. Section 44 is as follows:

“Every common carrier shall afford all reasonable, prompt and equal facilities for the prompt and efficient interchange and transfer of passengers, tonnage and cars, loaded or empty, between the lines owned, operated, controlled or leased by it and the lines of every other common carrier, and shall make such interchange and transfer promptly without discrimination between shippers, passengers or carriers either as to compensation charged, service rendered or facilities afforded. Every railroad company shall receive from every other railroad company having the same gauge track, at any point of connection, freight cars of proper standard and in proper condition, and shall haul the same either to destination, if the destination be upon a line owned, operated or controlled by such railroad company, or to point of transfer according to route billed, if the destination be upon the line of some other railroad company. But nothing in this Act shall be construed as requiring any common carrier to give the use of its terminal facilities to another common carrier engaged in like business.

“Every telephone company and telegraph company operating in this State shall receive, transmit and deliver, without discrimination or delay, the conversations and messages of every other telephone or telegraph company with which a joint rate has been established or with whose lines a physical connection may have been made.”

The obvious purpose of Section 44 is to authorize an interchange “of passengers, tonnage and cars, loaded or

empty," between different railroads. Said section does not give any authority to the North Shore Company to enter into any such agreements as here involved for the operation by it of its cars on the lines of the Northwestern Elevated and the South Side Elevated.

Section 45 of the utility acts, which is not, we understand, relied upon by the North Shore Company, should nevertheless be taken into consideration in passing upon the general intent of the legislature in enacting the several sections upon which that company does rely. This Section 45 purports to authorize the Commission to order the making of a spur track connection with the main line of a railroad. If the contention made by the North Shore Company as to the sections on which it relies is correct, then in similar manner it would appear from the language of this Section 45 that the Commission would have the authority to order the laying of such spur tracks across the streets and other public places of the municipality without getting any consent or authority from the municipal government. It is the well established practice, acquiesced in, so far as we are aware, by all parties, both before and since the passage of the public utility acts, that spur tracks cannot be laid in or across the streets of Chicago without having first obtained the permission and consent of the municipal authorities. One of the principal functions of the Department of Compensation for years past has been and now is, to fix the rate of compensation to be paid to the City for the laying, maintenance and operation of such spur tracks.

Section 46 relied upon by the North Shore Company purports to authorize the Commission to order track connection between two or more railroads "or between any two or more *street railroads* * * * so that the cars of any such railroad company may be speedily transferred from one railroad to another." This section reads as follows:

"Whenever the Commission shall find, after a hearing made upon complaint or upon its own motion, that the public convenience and necessity would be subserved by having track connections made, between any two or

more railroads, or between any two or more street railroads, the Commission shall order any such railroads or street railroads of the same or similar gauge to make physical connection at any and all crossings, and at all points where a railroad shall begin or terminate at or near any other railroad, and at all towns or cities where two or more railroads enter the limits of the same, so that the cars of any such railroad company may be speedily transferred from one railroad to another, and shall order whether the expense thereof shall be borne jointly or otherwise."

It well may be questioned whether this section really authorizes anything more than a connection for the switching or transfer of cars from one railroad company to another as is common, especially in the case of freight cars, between steam railroads. It surely does not purport to authorize the operation by one company of its own cars over the tracks of another company. But if it be assumed that such was the intent of the section it would still be perfectly clear that any authority granted by the section to the Commission was conditional upon the securing of a proper municipal franchise, permit, or consent. This is emphasized by the fact that this section specifically includes street railroads.

Section 48 which is relied upon by the North Shore Company reads as follows in the earlier act creating the Public Utilities Commission:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that public convenience and necessity require the use by one public utility of the conduits, subways, tracks, wires, poles, pipes or other property or equipment, or any part thereof, on, over or under any street or highway, belonging to another public utility, and that such use will not prevent the owner or other users thereof from performing their public duties nor result in irreparable injury to such owner or other users of such conduits, subways, tracks, wires, poles, pipes or other property or equipment, or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use, or the terms and conditions or compensation for the same, the Commission may, by order, direct that such use be permitted and prescribe a reasonable compensation and

reasonable terms and conditions for such joint use. If such use be directed, the public utility to whom the use is permitted shall be liable to the owner or other users of such conduits, subways, tracks, wires, poles, pipes or other property or equipment, for such damage as may result therefrom to the property of such owner or other users thereof; *provided*, that nothing in this section shall be construed to extend the jurisdiction of the Commission over the joint use of such facilities of public utilities mainly or primarily within a city and subject to the jurisdiction of such city."

This section was amended in the 1921 act creating the Illinois Commerce Commission by the omission of the proviso.

In our opinion this section, either in its original form or as amended in the Act of 1921, did not amount to a grant of power to any carrier included within its terms to operate its trains in or across the streets of a municipality unless a franchise, permit or consent had been obtained from such municipality. In our opinion the whole section proceeds on the assumption that the railroad companies referred to obtained any necessary municipal franchise, permit or consent. The Commission's authority to act is conditional upon the failure of the companies "to agree upon such use or the terms and conditions or compensation for the same." If, therefore, the companies agree, the Commission has nothing whatsoever to do with the matter. It is obvious, however, that if the companies do agree on such joint use and on the compensation to be paid they would not, merely by reason of such agreement, get any power to operate their trains in or across the streets of a municipality. (*City of Aurora v. Elgin Traction Co.*, 227 Ill. 485, 500.) The companies would have to get the necessary franchise, permit or consent from the municipal authorities before they could effectually agree among themselves as to the joint use or the compensation to be paid, and, likewise, if they fail to agree upon the joint use or the compensation to be paid they must obtain a municipal franchise, permit or consent before they can be authorized by the Commission to make such joint use upon such terms and conditions as to compensation as the Com-

mission may prescribe. It would be absurd to maintain that two carriers, who had agreed, as to the joint use and compensation, were still required to obtain a municipal franchise, permit or consent before they could actually operate their trains in and across the streets of the municipality, and that two companies who had failed so to agree could operate without such a franchise, permit or consent, merely because they had been ordered to do so by a commission. This would give to the failure to agree the effect of a grant by the municipality and would leave it always within the power of the companies to obviate the necessity of getting such municipal franchise, permit or consent by the simple device of failing to agree.

Indeed, in this case, the companies did not fail to agree. Hence the Commission had no power, under Section 48, to order them jointly to use the tracks. Therefore the order of the Commission was without effect, under this section, and the North Shore Company is in the position of contending that its agreement with the other companies in and of itself gave it a franchise, license or permit.

The elimination of the above quoted proviso in 1921 does not in any way help the contentions of the North Shore Company. The purpose of its omission is obvious. So long as that proviso was in the section, even though two carriers operating within a municipality had the necessary municipal franchise, permission or consent, still the Commission would be entirely without jurisdiction to compel the joint use of the tracks or to fix the compensation to be paid when the carriers failed to agree between themselves, because the proviso stated that, "nothing in this section shall be construed to extend the jurisdiction of the commission" in such a case. The only jurisdiction which the Commission had to pass upon such joint use or such compensation was found in this particular section, and the proviso therefore made the section entirely inoperative so far as facilities located in public streets of a city were concerned.

The elimination of the proviso does not in any way change the general rule which must be observed in construing

this and all other similar sections in the act, viz.: that a municipal franchise, permit or consent must be obtained before the operation of trains in or across the streets of a city can be undertaken, even though the company may have secured from the Commission an order purporting to authorize such operation. That the legislature in omitting in 1921 this particular proviso in Section 48 did not intend to divest the municipal authorities of their control over the use of the streets of the city is made perfectly plain by the reservation contained in this same Act of 1921 and above quoted to the effect that "nothing in this Act shall be construed to limit or restrict powers now or hereafter granted to cities to pass ordinances * * * governing the regulation, control or occupation of streets, highways and public property within the city." (Section 81.)

Section 50, one of the sections relied upon by the North Shore Company, has to do with the making of extensions and improvements to existing plants, etc. It vests in the Commission power to order additions, extensions, etc., and in the case of joint use by two or more companies failing to agree upon a division of the cost, the Commission is given the power to fix the proportion of the cost or expense to be borne by each. Nothing is said in the section which in any way implies that the Commission would have the power to order extensions or improvements in or across the streets of a municipality until and unless the municipality itself has granted permission or authority for such extension or improvement. Indeed, as is well known, the position has been consistently maintained before the Illinois Commerce Commission by the Chicago Surface Lines that they cannot be ordered by the Commission to make extensions of their lines in the streets of the city until and unless the city shall grant them a franchise, permit or consent so to do.

The last section relied upon by the North Shore Company is Section 55, which reads as follows:

"No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, prop-

erty or facility or in extension thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.

"No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, at the time this Act goes into effect shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

"Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

"Such certificates may be altered or modified by the Commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of two years from the grant thereof, authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void.

"No certificate of public convenience and necessity shall be construed as granting a monopoly or an exclusive privilege, immunity or franchise."

It is to be observed that several of the paragraphs in this section are in the form of negative provisions. For instance, the first paragraph prohibits construction by a utility "unless and until it shall have obtained from the Commission a certificate." This is far from saying affirmatively that upon obtaining such a certificate a railroad company could construct its tracks in or across the streets of a city without the consent of the municipal authorities. As above pointed out in our discussion of Section 50, such a position would be directly contrary to that maintained by the Chicago Surface Lines in proceedings before the Commission.

The second paragraph clearly recognizes that a franchise is something to be granted by the city or village, as do other sections of the act already referred to. This paragraph is

also in negative form in that it prohibits any utility company which did not at the time that the act went into effect have a city or village franchise or possess a certificate of public convenience and necessity issued by the former Commission from transacting "any business in this State until it shall have obtained a certificate from the Commission." This does not amount to an affirmative grant to operate trains in or across the streets of the municipality. There are many activities in which utility companies can engage without operating in or across the streets of a municipality. This is, of course, true of all operations throughout the state outside of municipal confines. It is also true of all corporate activities involving the organization of the company and the actual purchase or condemnation of private property within the confines of a municipality. It has been expressly decided by the courts that even before a franchise has been obtained a railroad company can condemn private property within the limits of a municipality. (See *C., M. & St. P. Ry. Co. v. Franzen*, 287 Ill. 346, 358.) But it cannot operate its trains in or across the streets or other public places without a municipal franchise, permit or consent. (Same case.)

The next paragraph to the section is affirmative in form and purports to authorize the Commission to issue a certificate of public convenience and necessity whenever it is of the opinion that "the transaction of any business by a public utility will promote the public convenience and is necessary thereto." It is apparently contended by the North Shore Company that the Commission is given power by said paragraph to authorize any public utility to engage in any undertaking whatsoever which the Commission finds "would promote the public convenience," and authorized the Commission to grant the right to occupy the streets of a municipality by either a commercial railroad or a street railway whenever the Commission found that the public convenience would be promoted, regardless of lack of a grant by the municipality. It is obvious that such a broad interpretation should not be placed upon this paragraph. If it were so construed it would be clearly unconstitutional as applied to street railways,—

the control over the use of streets by such railways being expressly reserved by the constitution to the municipal authorities as we have already pointed out. Neither can it be successfully contended that this paragraph would authorize a commercial railroad to occupy the streets of a municipality without the consent of the municipal authorities. We have already cited at considerable length the authorities holding that repeals by implication are not favored and that a long established public policy, such as we have in this state, in favor of municipal control of the streets of the municipality and of the occupation of such streets by street railways or commercial railroads, cannot be changed unless there is a clear declaration of such intent by the legislature. If it were intended by the legislature to change this long established public policy of the state it would have been easy for the legislature to have so declared its intention by expressly repealing the provisions of the Cities and Villages Act and the general Railroad Act expressly requiring the permission and consent of the municipality before its streets can be occupied by a street railway or commercial railroad. Certainly no intention to change the long established public policy of this state can be found in this third paragraph of Section 55. If this paragraph means what the North Shore Company contends it does, then the Commission would have the power to grant perpetual franchises for the use of the streets of Chicago either to street railways or to steam railroads and do this without obtaining the frontage consents forming a necessary condition precedent to the grant of any franchise by the municipality.

We have already pointed out that under the terms of Section 29, the Illinois Commerce Commission cannot revive or validate any lapsed or invalid franchise or "enlarge or add to the powers and privileges contained in the grant of any franchise," etc. This amounts to a positive declaration by the legislature that the Commission cannot grant a franchise and in view of the above considerations no power so to do can possibly be implied from the language of Section 55.

Our conclusion, therefore, is that the certificates of convenience and necessity relied upon by the North Shore Company did not grant to that Company the right to operate its passenger, merchandise despatch, express or freight trains over the tracks and structures of the Northwestern Elevated, the "Union Loop" and the South Side Elevated.

III.

CLAIMS BY ESTOPPEL AGAINST THE CITY OF CHICAGO.

The claims appear to be based on the following:

(a) That the City of Chicago was notified of the filing of the petition for an order of the Public Utilities Commission approving the lease and agreement of March 31, 1919, between the St. Paul Company, the North Shore Company and the Northwestern Elevated, in which an order was entered by the Commission on May 28, 1919, ⁽²⁹⁾ and of the hearing thereon and was represented at the hearing by the Corporation Counsel's office:

(b) That the City of Chicago was represented by counsel at the hearing of the petition of the North Shore Company for a certificate of convenience and necessity to operate its cars (1) over the main line of the Northwestern Elevated and the "Union Loop," (2) over the tracks of the South Side Elevated from the Union Loop to 63d street and Dorchester avenue, and (3) over the tracks of the same company to 63d street and Calumet avenue, in which an order ²⁹ was entered by the Commission on November 2, 1921; and

(c) That the North Shore Company pays to the City of Chicago a license fee of fifty dollars per car for each car operated by that company within the City of Chicago.

The Journal of the Proceedings of the City Council has been carefully examined to ascertain whether any ordinances or other action has been taken by it upon which any claims of estoppel against the City could be founded by the North Shore Company. With the exception of an order passed No-

²⁹ These are the orders hereinabove referred to.

vember 10, 1920 (Council Journal, page 988), authorizing that company to erect a bulletin board on roof of building at West Austin avenue and North Franklin street, no action of any kind appears. No claim of estoppel could be predicated on such an order. We conclude, therefore, that so far as we are now advised any claims of estoppel must rest upon the claims already advanced by the company and above set out.

ORDERS ENTERED BY PUBLIC UTILITIES COMMISSION ON (a) MAY 28, 1919, AND (b) NOVEMBER 2, 1921.

(a) *Order of May 28, 1919:*

The following finding is contained in the order:

“That the City of Chicago and the City of Evanston, as well as all other parties interested, were duly notified of this hearing; that the City of Evanston did not appear nor offer any objection to the approval of these contracts and lease; *that the City of Chicago did appear, by its attorney, and offered no objection to said contracts and leases, but stated that upon investigation of said leases and contracts it could find nothing objectionable to the interest of the public or the City in said leases and contracts or their terms and provisions.*” (Italics ours.)

(b) Order entered November 2, 1921:

The following is contained in said order:

“On the hearing of the petition by the Commission, the Chicago, North Shore and Milwaukee Railroad, petitioner, was represented by Ralph R. Bradley, its counsel, * * * and Chester E. Cleveland and Daniel A. Roberts appeared as counsel for the City of Chicago.

That no opposition or objection to the service sought by said petition has been offered by the City of Chicago nor any of the corporate parties interested.”

As heretofore pointed out, the City Council is the only body which could grant a right to operate an elevated railway in the streets of the City. The grant of a franchise or license to operate in public streets must be made by legislative act of the municipality and the City Council is the only

body which can take legislative action. (*C. & N. P. R. R. Co. v. Chicago*, 174 Ill. 439.) We have been unable to find that the Corporation Counsel or any other officer of the City ever notified the City Council of the filing of either of said petitions or that the City Council ever authorized the Corporation Counsel or any attorney to consent to the entry of an order approving said agreements. Without such authorization, no action of the Corporation Counsel in the proceedings before the Public Utilities Commission could be made the basis of a claim of estoppel against the City.

(c) *As to payment to the City of car license fees by the North Shore Company.*

It appears from the records of the City Clerk that the North Shore Company applied for and received car licenses and paid therefor at the rate of \$50 per car during the following years:

Year	License Numbers	Number of Cars
1920	1681 to 1742 Inclusive.....	62
1921	1108 to 1185 Inclusive.....	78
1922	1673 to 1757 Inclusive.....	85
1923	1 to 102 Inclusive.....	102

30

The claim of estoppel against a municipal corporation has been made frequently by those claiming rights as against the public. The books contain many decisions of reviewing courts on claims of this character and at the risk of appearing to take too seriously the claim of estoppel advanced by the North Shore Company, we call attention to a few of the cases which we have considered.

In the late case of *The People v. C., B. & Q. R. R. Co.*, 290 Ill. 327 (at p. 337), the court said:

“The doctrine of estoppel *in pais* is based on a fraudulent purpose and a fraudulent result. Before it can be invoked in aid of a litigant it must appear that the person against whom it is invoked has by his words or conduct caused such litigant to believe in the existence

30 These license fees constitute the only compensation ever paid to the City of Chicago by the North Shore Company.

of a certain state of things and induced him to act upon that belief.

* * * * *

Estoppel *in pais* was defined in *Washingtonian Home v. City of Chicago*, 157 Ill. 414, as 'an indisputable admission, arising from the circumstances, that the party claiming the benefit of it has, while acting in good faith, been induced by the voluntary, intelligent action of the party against whom it is alleged, to change his position. Again, it was stated in *Holcomb v. Boynton, supra*, and in *Sutter v. People's Gas Light Co., supra*: 'It is a novel idea in the law of estoppel that the doctrine should be applied to a person who has been guilty of no fraud, simply because, under a misapprehension of the law, he has treated as legal and valid an act void and open to the inspection of all.' "

In *Logan County v. City of Lincoln*, 81 Ill. 156, the court held that the city was not estopped from claiming certain money from the county because of the neglect of its Mayor and the County Judge to ascertain the amount due the city. The court said (at p. 159):

"Among the duties imposed upon the County Judge and the Mayor of the city by this section of the statute is, to ascertain the proportion of taxes to be paid to the city under its provisions. Such duties are ministerial, and the omission to perform them ought not to prejudice the rights of the injured party. Should these officers neglect their official duties in this regard, and fail to apportion the taxes, it is apprehended the amount may be ascertained in any other mode that satisfactorily establishes the fact.

"Recognizing, as we do, the doctrine of *estoppel in pais* may have its application to municipal corporations, still, there is nothing in the suggestion the plaintiff is estopped to assert this claim simply by the non-action of the city officers. It would be a pernicious doctrine to establish that public rights of municipalities could be cut off by the neglect of the appointed officers for an unreasonable time to enforce them. Before the doctrine of estoppel can be invoked, there must have been some positive acts by the municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done. But mere

non-action of its officers is not sufficient to work an estoppel as against a municipal corporation."

In *Bangor v. Bay City Traction & E. Co.*, decided by the Michigan Supreme Court (7 L. R. A. (N. S.) 1907, p. 1187), where a street railway had been built without the consent of the township authorities and after its construction and after its sale to the defendant the township filed its bill in chancery to require the removal of the rails from the street and where the railway company contended that the township was estopped from asking the relief sought, "because of the acquiescence of its officers in the building and maintenance of the road," the court held (at page 1193):

"The defendant's alleged estoppel cannot be sustained. If private persons can create easements by estoppel, under our Statute of Frauds, and our decisions; or if a license may be implied from the acquiescence of a private person, who stands by and sees, without protest, his land used for a railway,—the same cannot be said of township officers, who have no authority except such as the statute gives; and, if it could be, the testimony does not justify such a finding."

In *Burton Co. v. City of Chicago*, 236 Ill. 383, where the company sought to restrain the city from interfering with the construction of a vault under a public alley for which in 1906 the Commissioner of Public Works had issued a permit and accepted the company's indemnifying bond; and in 1908 the City Council passed a general ordinance regulating the use of space underneath the surface of any street or other public ground in the city, Section 2 of which prohibited the use of any space under the surface of the *roadway* of any street or public ground, the court said (p. 390):

"It is claimed that the appellant, having through the Commissioner of Public Works, granted the permit and accepted the bond and compensation from appellee, is estopped to deny the validity of the permit. It is conceded that the city had the authority to grant a permit to make the excavation and construct the vault in question, but the Commissioner of Public Works had no such authority. On the contrary, the ordinance prohibited his doing so. The appellee, in applying for the permit, must

be held to have known the commissioner had no power to grant it. * * * The agent of a municipal corporation can no more bind the corporation in its private corporate capacity beyond the authority conferred upon him than an agent of an individual can bind his principal beyond his authority. The mere issue of the permit gave no right to appellee, because the commissioner of public works was without authority to issue it. * * *

It is alleged that the appellee has begun the excavation of the alley, has had plans prepared looking to the construction of its building and the occupation of the space under the alley in connection therewith, and has let its contracts for construction and ordered building material in contemplation of using the space under the alley, and that it will be put to great expense if it cannot use such space and is obliged to change its plans. This action of appellee was, however, taken on its own responsibility, relying upon an invalid permit issued at its own instance without any authority, and was not induced by any action of the city or any of its officers, or even, so far as appears, with their knowledge."

In the case of *St. Louis A. & T. H. R. R. Co. v. The City of Belleville*, 122 Ill. 376, a committee of the common council and the city attorney had consented to the exclusive use of a certain street in the city by the railroad company; and the city, by an invalid ordinance, had offered such rights, and, in reliance upon such conduct, premises and ordinance, the company constructed and operated its tracks on the streets of the city. The court held that the foregoing facts did not estop the city from removing the company's tracks from the street, on the theory that the company was charged with notice of the invalidity of the ordinance and the want of authority of the city attorney and the committee of the common council.

The Supreme Court after referring to the provisions of the statutes requiring a three-fourths vote of all the aldermen to vacate a street and that no other body or officer has authority in the matter, said (at page 383) :

"No other body or officers or persons have authority in the matter. The records are open to the inspection of the public, and it is incumbent on anyone acting on the

faith that a street or alley is closed, to know what is the fact, unless he shall be prevented by those having authority to act for the city, from obtaining such knowledge. There is no evidence in this record tending to show that the railroad company was prevented by those having authority to act for the city, from learning whether this vacating ordinance was adopted by the requisite vote of the aldermen. The railroad company is therefore presumed to have known that it was not adopted, and hence that it was invalid and ineffective for any purpose.

The deed first made to the city was never accepted by the city council. Indeed, it was never presented to it, having been lost by the city attorney, in whose custody it was placed, and the second deed was expressly rejected by the city council. *The city attorney had no authority to accept the deed, and any use be made of it, not having been by the authority of the city council, is immaterial. It is of the essence of an estoppel in pais that the party having authority to act in the matters shall have knowingly done an act to influence the conduct of the other, and that the other must have acted on the faith of that act.* (Citing cases.)

No one pretends that a person having no authority to do an act can, by his conduct, estop others not responsible for his acts; and so here, no reason is shown why any reliance should have been placed by the railroad company upon the acts or promises of a committee of the Council, which was known to have no power itself to vacate streets, or upon the conduct of the city attorney, who was known to be equally destitute of such authority."

In *Chicago v. Oak Park Elevated R. R. Co.*, 261 Ill. 478, which was a bill in chancery filed by the City praying for discovery and an accounting in relation to the number of cars operated by the company and the amount of car license fees due the City and unpaid, the court said (at p. 490):

"Plaintiff in error introduced in evidence over the objection of counsel for the City, certain proceedings of the Council showing reports of the City Comptroller as to the amounts he collected, from time to time, from the plaintiff in error on account of car license fees. None of the receipts for the amounts paid were signed by the City Collector in person but by some person employed in his office. It further appears from the evidence that the

city collectors of the period when these license fees were collected were not acquainted with the terms of the various ordinances above set out and never empowered the employes who received such license fees as were paid, to compromise or settle any claims the City had against plaintiff in error. It does not appear that any of the city authorities had any knowledge of the number of cars actually in use by plaintiff in error."

As to the railroad company's claim of estoppel against the City, the court said (p. 497):

"The doctrine of estoppel as applied to the case at bar is, that the City, by representations of its officers or by taking the position it did with reference to payment of the license fees with a knowledge of the facts, induced or caused the plaintiff in error, it being ignorant of the facts, to change its position or act to its prejudice. The claim of the City in the case is simply that the plaintiff in error has paid less than it should have paid under the ordinances in question, and it is suing for an accounting. The mere failure of the officers of a municipal corporation to assert a right does not work an estoppel *in pais*. Before such doctrine can be invoked there must have been some positive acts by the municipal officers which may have induced such action of the adverse party, and whereby it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done. (Citing cases.) Plaintiff in error was not misled or induced to make any change, so far as shown by the record, and it is difficult to imagine how it has been prejudiced in any way. It has simply failed to pay, and the city has failed to receive, what the railroad company should have paid in license fees. The city collector had no authority to bind the city without action by the city council, and no action of the city collector was such as to bind the city. Someone in his office accepted the statements made by the officers of the plaintiff in error company and receipted for the amounts which the company chose to pay. If the city council, with full knowledge of the facts, had authorized the acceptance of such fees as were paid in settlement of the controversy the situation would be different."

We have examined all the cases in Illinois in which it has been held that a city is estopped to deny the use of its

streets to persons who have not procured an express grant from the city and find that in such cases

(a) the city has in effect abandoned a street for many years and this abandonment is shown by long acquiescence in its use by a person who has expended money in reliance on such abandonment; or

(b) the City Council or someone to whom the City Council has delegated authority for that purpose, has by affirmative action indicated its approval of the use; in other words, the city has been estopped by direct action taken by the City Council or by someone to whom it has delegated authority to act for it in the premises.

In all of these cases the party who has successfully urged the estoppel has shown a reliance on such action of the city by way of the expenditure of large sums of money which said party will be unable to recoup if the estoppel is not operative.

None of these cases are analogous to the situation here presented.

In our opinion the doctrine of estoppel *in pais* cannot be invoked against the City by the North Shore Company because of the conduct of the then Corporation Counsel in the proceedings before the Public Utilities Commission or because of the action of the City Clerk in issuing car licenses on the application of the company.

Respectfully submitted,

C. MORTON DOTY,

Assistant Corporation Counsel.

STEPHEN A. FOSTER,

WM. H. SEXTON,

WILLIAM H. HOLLY,

JEROME N. FRANK,

Special Assistant Corporation Counsel

Assigned to Committee on Local Transportation.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

What Constitutes A Boxing Exhibition.

November 21, 1923.

HON. MATTHEW ZIMMER, Acting Superintendent of Police.

Dear Sir :

Replying to your request for an opinion as to the legality of a proposed amateur boxing tournament to be held at the Hamilton Club, in the City of Chicago, we are constrained to hold that the statutes of the State of Illinois clearly and expressly forbid any such boxing tournament, and that such an exhibition will be undoubtedly in violation of law.

Section 493, page 1234 of Chapter 38 of Cahill's Illinois Revised Statute for 1923, provides as follows:

“493 (Boxing Exhibition—Promoters—Witnesses) Section 235. Whoever instigates, carries on, promotes or engages in as a witness any sparring or boxing exhibition, shall be fined not exceeding five hundred dollars, or confined in the county jail not exceeding six months.”

The word “exhibition” is defined by Volume 2 of the Century Dictionary, page 2067, as follows:

“Exhibition: 1. The act of exhibiting or displaying for the inspection; a showing or presenting to view. “Exhibition is more general than exhibit, the latter expressing sometimes a section of the former. As contrasted with exposition, exhibition deals more often with visible things and exposition with things mental; as an exhibition of machinery, but an exposition of a text or doctrine of philosophy.”

From the definition of the word “Exhibition,” it seems clear that the fact of whether the exhibition is for a consideration or whether any entrance fee is charged, is immaterial. So long as there is a displaying or presenting to view, there is an exhibition.

There could be no question but that the proposed boxing tournament of amateur athletes under the jurisdiction of the

Central Athletic Boxing Championship Tournament, before the members of the Hamilton Club, would be an exhibition of boxing or sparring, which is forbidden by the afore-quoted statute.

Very truly yours,

ALBERT H. VEEDER,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Funds Received for Vacation of Streets and
Alleys May be Added to the Fund Set Aside
for Public Benefits in Local Improve-
ment Proceedings.**

November 23, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You forwarded to us an order passed by the City Council requiring you to draft and submit to the Council an order or ordinance providing that moneys to be received for street and alley vacations in the near West Side widening projects be "added to the fund to be awarded by the County Court as public benefits and not put into the general corporate fund of the city, to the end that the property-owners who will be called upon to bear the heavy share of the cost of these improvements may benefit by such vacations." Your letter asks for an opinion concerning this matter, and we presume the question to be answered is what the legal effect of such an order or ordinance would be.

If the City Council sees fit to keep the moneys in question in a separate fund there is little doubt of its authority to do so, for while the statutes mention certain funds that must be kept separate, such as special assessment funds, the

water fund, bond funds, etc., the rule of exclusion of others where some are mentioned does not obtain to such an extent that it overrules the provisions of the Cities and Villages Act which give the City Council the control of the city's finances.

The setting apart of the money in this way, however, would be futile, and the evident purpose which the proponent of the Council order had in view would fail. There is no way in which the property owners who are assessed for the improvement could benefit by the fund.

The Local Improvement Act contemplates that the property owner shall not be called upon to pay more than his property is benefited by the improvement. This is determined in a judicial proceeding in which is also determined the proportion of the whole improvement that must be regarded as a public benefit and paid for by the whole people. This is determined without reference to any fund set apart for the purpose of defraying the cost thereof. There is frequently a fund on hand derived from proceeds of bonds issued to pay the public benefits, but that fact is not even taken into account, and it is not supposed to have anything to do with the division of the expense between the property owners and the public. We refer you to Sections 10, 33, 39 and 47 of the Local Improvement Act, wherein is set forth the procedure we speak of. At the close of Section 47 is this sentence:

“The determination of the court as to the correctness of the distribution of the cost of the improvement between the public and the property to be assessed, shall be conclusive, and not subject to review on appeal or writ of error.”

It will thus be seen that not even a reviewing court can change the finding of the court which determines the amount the property owner has to pay, and nothing can be gained by having a fund set up in this way. If it was the intention to collect after the improvement is in process, and in some way or other distribute the proceeds of the compensation received, either by payment to the property owners or

by a payment of a part of each of their assessments, that is so manifestly contrary to law that we need not enlarge on the subject.

We therefore recommend that the order of the Council be placed on file because, to the extent that it can be carried out, it is unnecessary and unavailing, and as to its main features it must be regarded as requiring something that cannot lawfully be done. We return the order herewith.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Legality of Using Milk Bottles of Six and One-half Ounce Capacity in Lunch Rooms.

November 23, 1923.

HON. CARMEN VACCO, Inspector of Weights and Measures.

Dear Sir:

On October 19, 1923, you requested an opinion from this department as to whether it was legal for lunch rooms in the City of Chicago to use a six and one-half ounce capacity bottle for the sale of milk.

In your letter you indicate that you consider this illegal, but base your opinion principally on the provisions of the ordinance. We endorse your position that such bottles cannot lawfully be used, but point out herein that the statute is what controls, and that if you had to rely on the ordinance alone there would be some question about it.

Section 4185 of The Chicago Municipal Code of 1922 provides that any glass bottle or jar used for the sale of milk

“shall have blown into it or otherwise indelibly and permanently indicated thereon in a legible and conspicuous manner the capacity thereof.” It is true, as stated in your letter, that exceptions for various sized bottles are provided for in this section, but this fact, of itself, is not sufficient basis for saying that the designation of certain sizes precludes the use of receptacles of other sizes. This would be extending the operation of the ordinance by implication, which, in the case of ordinances providing penalties for their violation, cannot be done (36 Cyc. 1179; *McNemas v. Cohn*, 115 Ill. App. 31). Under the ordinance all that can be required of the lunch rooms is that the bottles have the capacity blown in or indelibly marked thereon.

The statute, however, is broader than the ordinance, and reads as follows:

“25. Milk bottles—Sizes—What to appear on bottle—Identification of manufacturer—Serial number—When provision in force—Violations—Penalty—Tests by city inspectors.) Section 25. Bottles used for the sale of milk or cream shall be of the capacity of one-half gallon, three pints, one quart, one pint, one-third quart, one-half pint, and one gill when filled to the bottom of the cap, ring or stopple. The following variations on individual bottle or jars may be allowed, to wit: six drams above and six drams below on the half gallon, five drams above and five drams below on the three-pint, four drams above and four drams below on the quart, three drams above and three drams below on the pint, two and one-half drams above and two and one-half drams below on the one-third quart, two drams above and two drams below on the one-half pint, and two drams above and two drams below on the gill. Bottles or jars used for the sale of milk or cream shall have clearly blown or otherwise permanently marked in the side of the bottle the capacity of the bottle and the word ‘sealed’; and in the side or the bottom of the bottle the name, initials, or trade-mark of the manufacturer and a designating number, which designating number shall be different for each manufacturer and may be used in identifying the bottles. The designating number shall be furnished by the Director of Trade and Commerce upon application by

the manufacturer, and upon the filing by the manufacturer of a bond in the sum of \$1,000; with sureties, to be approved by the Director of Trade and Commerce, conditioned upon their conformance with the requirements of this section. A record of the bonds furnished and the designating numbers and to whom furnished shall be kept in the office of the Director of Trade and Commerce.

Provided, the requirement that the word 'sealed' and the designating number to be placed upon the bottle shall not be enforced as to any such bottles in use at the time of the passage of this Act until the first day of January, A. D. 1923; *and provided further*, such requirement for the marking of bottles shall not be construed as modifying or repealing any other laws of this State with reference to this subject.

Any manufacturer who sells or offers to sell milk or cream bottles to be used in this State that do not comply, as to size and markings, with the provisions of this section shall suffer a penalty of \$500, to be recovered by the Attorney General in an action against the offender's bondsmen to be brought in the name of the People of the State. Any dealer who uses, for the purpose of selling milk or cream, jars or bottles purchased after this law takes effect that do not comply with the requirements of this section as to markings and capacity, shall be deemed guilty of using a false or insufficient measure.

City inspectors of weights and measures are not required to seal bottles or jars for milk or cream marked as in this section provided, but they shall have the power to and shall from time to time, make tests on individual bottles used by the various persons, firms, or corporations, in the territory over which they have jurisdiction in order to ascertain if the above provisions are being complied with, and they shall immediately report violations found to the Director of Trade and Commerce" (Cahill's Revised Statutes of 1923. Chapter 147, p. 25).

Under this section the use of bottles of a capacity other than those specified, is unlawful.

Yours truly,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Requiring Bond to Protect Issuance of Duplicate
Special Assessment Vouchers When Originals
are Lost or Stolen.**

November 24, 1923.

HON. LOUIS E. GOSSELIN, Deputy Comptroller

Dear Sir:

In your communication of November 16, 1923, you ask an opinion from this department as to whether the Comptroller would be amply protected in honoring duplicate special assessment vouchers issued by the Board of Local Improvements (in case the same are issued), for vouchers amounting to \$25,000.00, lost, misplaced or stolen from the Chicago Title & Trust Co. which held them in trust, upon the filing of an indemnifying bond of twice the par value of the missing vouchers by the Chicago Title & Trust Co.

In reply we beg to advise that while we have no doubt that the Chicago Title & Trust Co. will, at all times, stand up to its bond, it has for years been the rule of this department to demand that the party claiming the amount due on any lost or stolen instrument establish his claim in court and file an indemnifying bond in accordance with Section 14 of the Negotiable Instruments Act.

We can see no reason for modifying our opinion of March 4, 1918, relative to the same subject; or from departing in any way from the rule above stated.

Yours very truly,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Withdrawal of Surety Company from Bond of a Public Officer.

November 24, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your communication of November 23, 1923, stating that you are in receipt of a communication from the Southern Surety Company, stating that they propose to withdraw from the bond of John F. Cullerton, Fire Commissioner. You also state that said bond of \$25,000.00 was filed with the City Council on November 22, 1922. The premium on said bond became due November 22, 1923.

The Southern Surety Company has a right to withdraw from this bond of it complies with the statutory requirements as set forth in Chapter 103, Section 10, of the 1923 Smith-Hurd Illinois Revised Statutes.

In case the said surety company does conform with the aforesaid section it will be necessary for the Fire Commissioner to file a new bond, which bond must be approved by the City Council.

Very truly yours,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Electric Railway Franchise Granted by Town
of Stickney Before Its Annexation to City of
Chicago Terminates Upon Its Annexation.**

November 26, 1923.

MR. I. LEE SEARS, Secretary, Local Transportation Committee.

Dear Sir :

In your letter of November 5, 1923, you refer to a letter dated June 21, 1923, addressed to this office asking for an opinion as to whether the franchise of the Chicago & Joliet Electric Railway Company, "is in effect against the City of Chicago since the annexation of the Town of Stickney." I beg to advise that we have made an exhaustive search for some records that would indicate the nature and extent of the franchise referred to, but that we have been unable to find any such records. We are, however, informed that the franchise still has a considerable period to run, and, if that be the fact, the franchise is effective against the City of Chicago for the remainder of the term for which it was granted.

It is the law of the State, though somewhat out of harmony with the general weight of authority, that an indeterminate franchise terminates with the annexation of the granting municipality to some other municipality, for the reason that it is held that where no time has been fixed when such rights shall cease, the grant was commensurate only with the life of the grantor itself (*Blair v. Chicago*, 201 U. S. 400).

Where, however, the franchise is granted for a fixed term of years we know of no reason or authority for the proposition that such franchise automatically determines upon annexation before the expiration fixed in the grant.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Distribution of Coupons Redeemable in Cash in Bottles of "Orange Crush"—What Constitutes a Lottery.

November 27, 1923.

HON. MATTHEW ZIMMER, Acting Superintendent of Police.

Dear Sir:

You have requested an opinion from the Corporation Counsel as to whether the distribution of money coupons in connection with the sale of a beverage known as Orange Crush constitutes gambling or a lottery, which is forbidden by the Illinois Criminal Code. The poster which you have sent us advertising the sale of Orange Crush announces that in some of the Orange Crush bottles there is concealed underneath the cap a coupon. Some of these coupons are worth five cents, others ten cents, and still others twenty-five cents. They are redeemable in cash by any dealer handling Ward's Crushes or by the Orange Crush Bottling Company's salesmen. Some of the bottles are blanks, that is to say although they contain the same quantity of the beverage, they do not contain any cash coupons.

Paragraph 401 (page 1217) of Chapter 38 of Cahill's Revised Statutes for 1923, defines lotteries in the following language: .

"Par. 401. SETTING UP.) Section 180. Whoever sets up or promotes any lottery for money, or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property, with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids,

either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding \$2,000."

Paragraph 402 of said Chapter 38 forbids any person from aiding in the disposal of property by lottery and provides a penalty therefor in the following language:

"Par. 402. PERMITTING.) Whoever, in a house, shop or building, owned or occupied by him, or under his control, knowingly permits the setting up, managing or drawing of such lottery, or such disposal or attempt to dispose of property, or the sale of a lottery ticket, or share of a ticket, or any other writing, certificate, bill, token or other device, purporting or intended to entitle the holder, bearer, or any other person to a prize, or to a share of, or interest in a prize, to be drawn in a lottery, or in such disposal of property, and whoever knowingly suffers money or other property to be raffled for in such house, shop or building, or to be won there by throwing or using dice, or by any other game of chance, shall, for each offense, be fined not exceeding \$2,000."

In view of the above provisions of the Criminal Code of Illinois there is no doubt but that the distribution of cash coupons in connection with the sale of Orange Crush constitutes a lottery forbidden by the above quoted statute. For it is clear that this is a drive to attempt to dispose of personal property with intent to make the disposal of such personal property dependent upon and connected with a chance by numbers, whereby such chances or device is made an additional inducement to the sale of said property.

The mere fact that the beverage itself may be intrinsically worth the price charged for it does not alter the situation. In the case of *Thomas v. The People*, 59 Ill. 160, tickets were being sold for a series of musical receipts, the proceeds of which were to be donated to charity. In connection with the sale of said tickets prizes were to be distributed, the dis-

tribution to be fixed by chance. The court, after holding that this constituted a lottery, at page 164, said:

“Even if the ticket to the concerts and lectures and an engraving were intrinsically worth \$5.00, the scheme would still be a lottery. The hand bill advertisement delivered with each ticket held out inducements to purchase. Each person who invested \$5.00 became entitled to a chance for \$50.00 in glittering gold or \$25.00 in green backs, or a splendid residence in Chicago, or in Brooklyn, New York. The purchasers were thus incited to rivalry. Gold, which, in the estimation of some, opens all the avenues of pleasure, was the lure to incite the credulous and unsuspecting into this scheme.”

So, in the distribution of this beverage the added inducement obtains of cash prizes even though the beverage itself may be worth the price paid, nevertheless the scheme is a lottery and is forbidden by the Criminal Code.

We therefore advise you that all persons who exhibit these posters advertising this lottery and all persons who sell these bottles knowing that in so doing they are aiding in the distribution of cash prizes by chance, should be notified that their actions are unlawful. Should they then persist either in the advertisement of this scheme or in the sale of the bottles containing the cash coupons, they should be arrested and prosecuted for a violation of the above quoted Section 401 of the Illinois Criminal Code. Or, should it be advisable, the license of any soft drink retailer can be revoked for abetting the carrying on of this lottery.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Illegality of Election to Vote on Annexation of Norwood Park to City of Chicago.

November 28, 1923.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO:

Gentlemen:

We beg to advise your Honorable Body that the attempted annexation of a portion of the Township of Norwood Park on which a vote was taken on November 6, 1923, has proven abortive, owing to the fact that the election thereon was not held within the time prescribed by statute.

The question was submitted at a special election called by the City Council. (See Council Journal, October 17, 1923, p. 880.) Although a regular County election was held on the same day, it was not a regular election of the City of Chicago. If submitted at a special election such a question must be submitted within sixty days of the time when the petition is presented to the City Council. This is required by Section 1 of the annexation act of 1872, under which the proceedings were had.

That part of said Section 1 as relates to this point reads as follows:

“Section 1. That on petition, in writing, signed by a majority of the legal voters, and by a majority of the property owners in any territory contiguous to any city or incorporated village or town, and not embraced within its limits, the city council or board of trustees of said village, city or town (as the case may be) shall submit to a vote of the people of said city, village or town (as the case may be) at its next regular election or a special election to be called within sixty (60) days after said petition is presented, the question of the annexation of such proposed territory: *Provided, however*, that where the said petition shall be presented within ninety (90) days prior to a regular election no special election shall be called.”

From the above it will be seen that if the proposition is not submitted at a special election then it can be submitted after sixty days have elapsed, the only requirement being that if it is to be voted on at a regular election it must be submitted at the first regular election that occurs after the petition is presented. If submitted at a special election, however, such special election must be held within sixty days after presentation of the petition, which was not done.

The petition in question was drawn with the prayer that the question be submitted "to a vote of the people of the said City of Chicago at its next regular election." This could not be carried out because the petition was presented to the City Council on March 31, 1923, and the next regular election was held three days thereafter. The situation is such, therefore, that it is not even possible to re-submit the proposition at the next regular election, a proceeding that would be doubtful in any event.

There are some irregularities and imperfections in the petition which we need not call attention to, because there is no possibility of curing the defective procedure already pointed out.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Time Spent on Furloughs in Computing Police Pension Rights.

December 1, 1923.

MR. PETER S. LYNCH, Secretary, Retirement Board of the Policemen's Annuity and Benefit Fund.

Dear Sir:

There has been referred to this department, the written communication of Richard P. Curran, 2919 Haynes Court,

Chicago, to the effect that the records of the Retirement Board credit him with time from November 22, 1915, only whereas, he was appointed a police operator on April 5, 1912, was discharged September 13, 1912, and was reinstated April 21, 1913. Mr. Curran also states in his letter that he was on military furlough, with pay, from July 16, 1917, to December 3, 1917, and on military furlough, without pay, from January 1, 1918, to July 7, 1919.

Section 49 of the Policemen's Annuity and Benefit Fund, provides, among other things, as follows:

"In computing the term of service rendered by any policeman prior to the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, the following periods of time shall be counted, in addition to all periods of time during which such policemen shall have performed the duties of his position, as periods of service for annuity purposes only: All periods of vacation, all periods of leave of absence with whole or part pay, all periods of leave of absence without pay which were necessary on account of disability."

If the police records bear out Mr. Curran's contention as to the dates hereinabove mentioned, I am of the opinion that Mr. Curran should be credited with time from April 21, 1913; that he should be permitted to pay into the several annuity funds the percentage of salary of his position not already heretofore paid from April 21, 1913, including the periods of time Mr. Curran was on military furlough; and that he should have credited to the said annuity funds the proportionate contribution of the city for the same period.

I am returning herewith the letter of Mr. Curran.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Extension of Elevated Platforms.

December 1, 1923.

HON. THOMAS F. BYRNE, Superintendent of Streets.

Dear Sir:

Replying to your letter of November 27, 1923, we are of the opinion that it would be unlawful and improper for you to issue a permit to the Northwestern Elevated Railroad Company for the construction of its proposed platform extension at Chicago avenue according to the plan submitted to us.

Section 7 of the ordinance of January 8, 1894, under which the main line of the Northwestern Elevated was built from the "Union Loop" to Wilson avenue, provides as follows concerning the building of platforms (Special ordinance of 1915, page 1291):

"Section 7. The said company shall have permission and authority, and the same are hereby given and granted to it, to construct and maintain over the streets, avenues and alleys, or portions thereof, across which its said elevated railroad is to be permitted to be constructed as aforesaid, all necessary or proper stations, platforms and depot stations, and to connect the same with said streets, avenues and alleys by means of all necessary stairs, stairways, elevators, landing places and other constructions and appliances for ingress, egress and the accommodation of passengers; but such platforms, stations, stairs, stairways, elevators and maintained as not to unnecessarily impair the usefulness of such streets, avenues or alleys or any portion thereof. * * * The permission and authority to locate, construct and maintain all such requisite platforms, landings and lines of stairs, leading to and from the sidewalks of the streets, avenues and alleys and the said elevated stations, being herein expressly granted said company, whenever and wherever such methods of reaching said stations may be found necessary. * * * The plans and specifications of such depots, platforms and stairs shall be submitted to and approved by the Commissioner of Public Works before the work of construction thereof shall be commenced."

This general authority is, however, limited by the following section contained in an ordinance passed July 28, 1913, and accepted by the Northwestern Elevated Railroad Company on September 4, 1913, which ordinance provided for the through-routing service now conducted over the tracks and structures of the four elevated railroad companies operating in Chicago:

"Section 4. Each of said four companies is hereby authorized to construct and maintain extensions of the platforms of each of its stations on all its lines of railroad within the City of Chicago (exclusive of the Union Loop) *so as to make the total length of each platform not more than three hundred and thirty (330) feet, to enable it to accommodate a seven car train at each such station*, and is hereby authorized to make such re-alignment of its tracks and such structural changes at each such station as may be necessary or convenient for the construction and maintenance of the extended platforms." (Special ordinance of 1915, page 1152.)
(Special ordinance of 1915, page 1152).

We are informed by Mr. Fock of the Engineering Service of the Northwestern Elevated Railroad Company that the present platform at Chicago avenue is three hundred and twenty-five (325) feet in length, while the proposed extension is three hundred and twenty-eight (328) feet in length, and if constructed would make the total platform six hundred fifty-three (653) feet over all.

In view of these facts, we are of the opinion that the proposed extension can not be authorized except by action of the City Council.

Respectfully submitted,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**City Within Sanitary District Not Owning System of
Water Works May Force City Owning a System
to Supply it With Water Even When Cities
are Not "Contiguous."**

December 3, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In reply to your letter of November 28, 1923, in which you ask us to "have the Niles Center Matter investigated, in order that you may know whether to take any further steps toward supplying them with water and also whether the words 'contiguous to' would have any effect on such demands, having particularly in mind West Hammond" we beg to advise you as follows:

Section 348, Chapter 42, of Smith-Hurd, Illinois Revised Statutes of 1923, with reference to the obligation of the City of Chicago to furnish a supply of water to adjoining cities, towns and villages, etc., is as follows:

"348. WATER SUPPLY—HOW FURNISHED—TERMS.)
Section 26. Whenever in any such sanitary district there shall be a city, incorporated town or village, which owns a system of water-works and supplies water from a lake or other source which will be saved and preserved from sewage pollution, by the construction of the main channel, drain, ditch or outlet herein provided for, and the turning of the sewage of such city and district therein, and there shall be in such sanitary district any territory bordering on any such city, incorporated town or village, within the limits of another city, incorporated town or village, which does not own any system of water-works, at the time of the creation of such sanitary district then upon application by the corporate authorities of such latter named city, incorporated town or village, the corporate authorities of such city, incorporated town or village, having such system of water-works shall furnish

water at the boundary line between such municipalities by means of its water-works to the corporate authorities asking for the same in such quantities as may be required to supply consumers within said territory, at no greater price or charge than it charges and collects of consumers within its limits for water furnished through meters in like large quantities:

Provided, however, that where any such latter named city, incorporated town or village has no territory bordering upon such city, incorporated town or village so owning a system of water-works and supplying water as aforesaid, such latter named city, incorporated town or village may receive water in the same manner and under the same conditions as though it had territory bordering upon such municipality owning a system of water-works and supplying water as aforesaid; provided such latter named city, incorporated town or village builds or causes to be built suitable and sufficient water mains to the limits of such city, incorporated town or village so owning a system of water-works and supplying water as aforesaid to connect with the water-mains and receive the water from such city, incorporated town or village so owning a system of water-works and supplying water as aforesaid. (As amended by act filed June 28, 1917.)"

From a careful perusal of the foregoing section of the statute we are of the opinion that it is not absolutely necessary for a city, incorporated town or village, within the Sanitary District of Chicago, to have territory bordering upon or contiguous to such city, incorporated town or village so owning a system of water-works to entitle such city, incorporated town or village to be supplied with water. However, the Supreme Court of our State has never construed the foregoing section as amended or passed upon its constitutionality.

Respectfully submitted,

THOS. W. FLYNN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Whether a Mutual Insurance Corporation Other Than
Life May Act as Surety on Depositary Bonds.**

December 4, 1923.

HON. MARTIN J O'BRIEN, City Comptroller.

Dear Sir:

Your letter of recent date concerning the acceptance of the Integrity Mutual Casualty Company as surety on bonds of city depositary banks was referred to the undersigned for consideration and reply.

You state that it has been your custom to accept only such surety companies on bonds of this kind as are accepted by the Federal government, which publishes a list of companies that it accepts. The company in question is not on that list. We understand, further, that no mutual company is on such accredited list.

Attached to your letter is a copy of a letter from this company to you, in which it is stated that the company is organized as an incorporated legal reserve company, with cash surplus of \$500,000, that it is twelve years old and has been doing a casualty business all of that time, but entered the surety business only in the past year after obtaining an opinion from the Attorney General that it could write surety business under its charter. There is a statement that "it has, through reinsurance, reserve strength of over \$5,000,000 in cash surplus and over \$17,000,000 in assets." We are not sure of the meaning of this, and whether it can be considered as indicating any strength on the part of this company as a basis for insuring. Neither can we pass on the question of the liability of the "reinsuring syndicate" mentioned in the letter. We made some further inquiry, and were informed verbally that the company had \$250,000 on deposit with the State Insurance Department.

There are two separate questions presented. One relates to the question of the sufficiency of the surety if this company is given the risk. We have nothing to do with this except that you must understand that if this company's policies are accepted other mutual companies will want the same treatment. That will open up the question as to whether there is any other safe guide besides the Federal Government's list. This list is made up of a very limited number of apparently sound companies. Absolute safety may prompt you to adhere to this list. If you so decide no one can question your right to do so. There is no such thing as compelling you by mandamus or any other proceeding to accept bonds that are not entirely satisfactory to you from every point of view—legal, financial or otherwise.

The other question presented is whether companies formed under the act relating to mutual insurance corporations other than life can lawfully be accepted by you as sureties of the depository banks. In determining this the of the Attorney General under date of February 15, 1923, is helpful in defining the scope of activities of mutual companies.

We have an act governing the business of surety companies on "bonds required by law." (See Cahill, 1923, p. 932.) This was passed in 1897. It specifies the qualifications essential to give a surety company the right to do such business. While the qualifications thus specified are manifestly intended to apply to old line companies, they are not so far peculiar to that kind of company as to make the substantial requirements inapplicable to mutual companies. In order that you may have before you the exact provisions that are prescribed by statute we quote the following section from the act:

"Section 3. That such company, to be qualified to so act as surety or guarantor, must comply with the requirements of every law of this State applicable to such company doing business therein; must be authorized under the laws of the State, where incorporated, and under its charter, to become surety upon such bond, obligation, recognizance or guaranty; must have a fully

paid-up and safely invested and unimpaired capital of at least two hundred and fifty thousand (250,000) dollars; must have good, available assets exceeding its liabilities, which liabilities, for the purpose of this act, shall be taken to be its capital stock, its outstanding debts and a premium reserve at the rate of fifty per centum of the current annual premiums on each outstanding bond, recognizance and obligation of like character in force; must file with the superintendent of insurance a certified copy of its certificate of incorporation, a written application to be authorized to do business under this act, and shall, also, annually, during the month of January, file with the superintendent of insurance a statement verified under oath, made up to December 31st preceding, stating the amount of its paid-up cash capital, particularizing each item of investment, the amount of premiums upon existing bonds, recognizances and obligations of like character in force upon which it is surety, the amount of liability for the unearned portion thereof, estimated at the rate of fifty per centum of the current annual premiums on each such bond, recognizance and obligation in force, stating also the amount of its outstanding obligations of all kinds and such further facts as may be by the laws of this State required of such company in transacting business therein; and if such company be organized under the laws of any other State than this State, it must have on deposit with a State officer of one of the States of the United States not less than one hundred thousand (100,000) dollars in good securities, deposited with and held by such officer for the benefit of all the holders of its obligations; must also appoint an attorney in this State upon whom process of law can be served, which appointment shall continue until revoked or another attorney be substituted, and must file with the superintendent of insurance evidence of such appointment, which shall state the residence and the office of such attorney" (Cahill Rev. St. 1923, p. 932).

The act relating to mutual companies other than life was passed in 1915. (See Cahill, Rev. St. 1923, p. 2003.) Its provisions were not taken into account when the section we quoted above was enacted. It seems clear, however, that the Legislature intended thereby to make it possible for mutual companies to write all kinds of insurance except fire and life. There are other acts which cover the fire and life busi-

ness, and therefore these classes are expressly excluded from the act we are discussing.

In the opinion of the Attorney General above referred to it is held that Clause 7 of Section 7 permits the mutual companies organized under that act to write any kind of insurance except fire and life. We believe this conclusion is sound. Section 7 first enumerates, in the clauses numbered 1 to 6, a number of different kinds of insurance that such companies may write, then adds Clause 7, which reads as follows:

“7. Against any loss or liability arising from any other casualty or insurance hazard which may lawfully be the subject of insurance, excepting life or fire”
(Cahill, 1923, p. 2004).

If there were any conflict between the above provision and the other act from which we quote, we would be constrained to hold that this later act authorizes such mutual companies to write “bonds required by law.” We do not believe there is any real conflict, however, and that the later act must be read in connection with the surety act. In other words, if such mutual companies desire to write “bonds required by law,” they must comply substantially with the requirements specified for the old line companies. When that is done they are, in our opinion, qualified to act as such sureties.

Hence, if you are satisfied that the Integrity Mutual Casualty Company has brought itself into conformity with the prescribed qualifications it may lawfully underwrite the bonds of depository banks.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power and Authority of the City to Operate A Warehouse on the Municipal Pier.

December 4, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

A request has been received from you for an opinion in regard to the right of the City to operate a warehouse on the Municipal Pier, and to issue in connection therewith negotiable warehouse receipts.

The City has been given the express right to operate a warehouse in connection with a Harbor Utility by Section 1160 of Chapter 24, page 746, Cahill's Illinois Revised Statutes of 1923. Said section is as follows:

"Section 1160. Cities and villages may acquire, own, construct and maintain harbors, etc.—Elevators, vaults and warehouses—Terminal Facilities.) Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every city and village in this State shall have the right, power and authority, and such right, power and authority are hereby granted to acquire, own, construct, maintain and operate anywhere within the jurisdiction or limits of the city or village, or in, over and upon any public waters bordering thereon, harbors, canals, slips, wharves, docks, levees, piers, quay walls, breakwaters and all appropriate harbor structures, facilities, connections and improvements, and in connection therewith to acquire, own, construct, maintain and operate such elevators, vaults and warehouses (including cold storage warehouses), as may be necessary adjuncts or incidental to transportation and railroad terminals, and to acquire, own, construct, maintain, and operate all other necessary or appropriate terminal facilities (Callaghan's 1916 Stat., Sec. 2111 [1])."

Since the right is granted not only to acquire, own, construct, and maintain, but also to operate a warehouse, there is no question but that the City has a right to do all acts

necessary and incidental to the transaction of a warehouse business; this of necessity includes an issue of negotiable and non-negotiable warehouse receipts.

The City of Chicago when engaged in the operation of a warehouse business, is, however, subject to the Statutes of the State of Illinois regulating warehouses. Warehouses are defined by Article XIII, Section 1 of the Constitution of Illinois, 1870, in the following language:

“What are warehouses.) Section 1. All elevators or storehouses where grain or *other property* is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.”

Warehouses are classified and defined by “an act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to Article XIII, Constitution of this State”; this act appears in Section 202, Chapter 114, page 2776 of Cahill’s Illinois Revised Statute of 1923.

“202. Warehouses classified.) Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That public warehouses, as defined in Article 13 of the Constitution of this State, shall be divided into three classes, to be designated as Classes A, B and C, respectively” (J. & A. Par. 8965).

“203. Classes defined.) Section 2. Public warehouses of Class A shall embrace all warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, such warehouse, elevators or granaries being located in cities having not less than one hundred thousand inhabitants. Public warehouses of Class B shall embrace all other warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together. Public warehouses of Class C shall embrace all other warehouses or places where property of any kind is stored for a consideration” (J. & A. Par. 8966).

“204. Public warehouses licensed.) Section 3. The proprietor, lessee or manager of any public warehouse of Class A shall be required, before transacting any business in such warehouse, to procure from the Board of

Commissioners of Railroads and Warehouses a license, permitting such proprietor, lessee or manager to transact business as a public warehouseman under the laws of this State, which license shall be issued by said commissioners upon a written application therefor, which shall set forth the location and name of such warehouse, and the individual name of each person interested as owner or principal in the management of the same; or, if the warehouse be owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated; and the said license shall give authority to carry on and conduct the business of a public warehouse of Class A in accordance with the laws of this State, and shall be revocable by the said commissioners, after full hearing, upon satisfactory proof of any violation of law by such licensee, such proof to be taken in such manner as may be directed by and under rules to be established by said commissioners (but the action of such commissioners in granting or refusing licenses and in revoking licenses may be reviewed by the Circuit Court of the county where such elevator or warehouse is located).

The sections of said act following the aforequoted sections of said statute are concerned with Class A warehouse, viz: warehouses which are used for the storage of grain. It will be observed that the operation of a warehouse on the Municipal Pier, being for the purpose of a storage of property other than grain is a warehouse of Class C, and the City is not required to take out a license under the Warehouse Act.

The following sections of the statute regulate the issuing of warehouse receipts and their form, and the City of Chicago must comply with these regulations:

“224. Warehouse receipts negotiable.) Section 24. Warehouse receipts for property stored in any class of public warehouses, as herein described, shall be transferable by the indorsement of the party to whose order such receipt may be issued, and such indorsement shall be deemed a valid transfer of the property represented by such receipt, and may be made either in blank or to the order of another. All warehouse receipts for property stored in public warehouses of Class C shall distinctly

state on their face the brand or distinguishing marks upon such property" (J. & A., Par. 8988).

"236. Who may issue receipts.) Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* Warehouse receipts may be issued by any warehouseman" (J. & A., Par. 9000).

"237. Form—Requisites—Liability of warehouseman due to omission of terms.) Section 2. Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

- (a) The location of the warehouse where the goods are stored.
 - (b) The date of the issue of the receipt.
 - (c) The consecutive number of the receipt.
 - (d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order.
 - (e) The rate of storage charges.
 - (f) A description of the goods or of the packages containing them.
 - (g) The signature of the warehouseman, which may be made by his authorized agent.
 - (h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and
 - (i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.
- A warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of the terms herein required" (J. & A., Par. 9001).

"238. Other terms and conditions.) Section 3. A warehouseman may insert in a receipt, issued by him, any other terms and conditions; *Provided*, that such terms and conditions shall not

- (a) Be contrary to the provisions of this Act.

- (b) In anywise impair his obligation to exercise that degree of care in the safe keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own" (J. & A., Par. 9002).

"239. Non-negotiable receipt defined.) Section 4. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt" (J. & A., Par. 9003).

"240. Negotiable receipt defined—Effect of insertion of provision that receipt is non-negotiable.) Section 5. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt.

No provisions shall be inserted in a negotiable receipt, that it is non-negotiable. Such provisions, if inserted, shall be void" (J. & A., Par. 9004).

"241. 'Duplicate' receipts to be marked—Liability where receipt is not marked.) Section 6. When more than one negotiable receipt is issued for the same goods, the word 'duplicate' shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be the original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt" (J. & A., Par. 9005).

"242. 'Non-negotiable' receipt to be marked—Liabilities—Acknowledgments of an informal character.) Section 7. A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it 'non-negotiable,' or 'not negotiable.' In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman, the same liabilities he would have incurred had the receipt been negotiable.

This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character" (J. & A., Par. 9006).

The sample forms of negotiable and non-negotiable warehouse receipts of the Chicago Steamship Lines which you

have supplied do not comply with the aforequoted statute in the following respects: The rate of storage charges do not appear upon the receipt as required by paragraph 237 (e). The non-negotiable receipt of the Chicago Steamship Lines states that the goods are deliverable to the person named in the receipt or his order. This is in violation of paragraph 239. The non-negotiable receipt should recite that the goods will be delivered to the depositor or to any other specified person. The form, therefore, should be as follows:

“For account of or
and deliverable only upon payment of all charges due
and the return of this receipt properly endorsed.”

If the second blank space in this receipt is not filled out with the name of a specified person, it should be crossed out; for when the receipt is made payable to the order of bearer, it becomes negotiable.

It may be noted that the provisions of an Act of June 29, 1921, creating the Illinois Commerce Commission, do not apply to Utilities owned and operated by a municipality so that there is no question but that the City of Chicago is not subject to the jurisdiction of the Illinois Commerce Commission in the operation of this Utility. Section 25 of Chapter III, a, page 2679 of Cahill's Illinois Revised Statute for 1923, in prescribing the organization and powers of the Illinois Commerce Commission defines the term "Public Utility" as follows:

“The term ‘public utility’ when used in this act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any transportation district or *other municipality*, and except such telephone company or companies which are or may hereafter be purely mutual concerns, having no rates or charges for services, but paying the operating expenses by assessment upon the members of such company or companies and no other person or persons) that now or hereafter * * *”

It is also desired to call attention to the following paragraph of the Warehouse Act, which provides that a copy of said act shall be posted in a conspicuous place in all public warehouses. Such section is as follows:

“Par. 227. Printed copy of act posted.) Section 27. All proprietors or managers of public warehouses shall keep posted up at all times, in a conspicuous place in their public offices, and in each of their warehouses, a printed copy of this act.”

It is therefore, in conclusion, submitted that the City has the right to operate a warehouse on the Municipal Pier in connection with the use of said Pier for transportation purposes, and that the City has the right to issue negotiable and non-negotiable warehouse receipts, provided the changes be made in the sample forms of said receipts as heretofore indicated.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City for Damage to Land Caused by Blasting in Constructing Water Tunnel.

December 6, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

The Corporation Counsel has investigated the facts in regard to the claim of Dr. E. L. Cornell for compensation for damage to his coal bin, located at 7245 Princeton avenue, and we herewith report the results of our investigation and our conclusions of law thereon.

The City of Chicago has been engaged for some months past, and is still engaged in the construction of a water tunnel located at a depth of 150 feet under 73d street. The purpose of this construction is to connect the water tunnel located at Western avenue and 73d street with that located at State street and 73d street. This work is being done directly by the City of Chicago, and under the immediate supervision of the Bureau of Water. The said tunnel is being excavated from solid rock and the construction of the same renders it necessary to use dynamite for the purpose of blasting.

The residence of Dr. E. L. Cornell is located at 7245 Princeton avenue. A coal bin had been constructed in his basement by the erection of 2x4's placed in a vertical position and planks nailed horizontally upon them. These 2x4's were not securely fastened to the floor. Due to the vibration in the earth from the blasting as aforesaid, these 2x4's became loose, allowing the bin to collapse. The immediate cause of the collapse of the coal bin was the use of dynamite by the City in constructing the tunnel. Dr. E. L. Cornell claims that the amount of damage which he has sustained is Thirty Dollars and Fifty cents (\$30.50). Mr. Dean, a construction engineer of the Bureau of Water, who has had charge of this work, and who has examined the damage done on these premises, reports that, in his opinion, this is a fair estimate of damage.

The law is well settled that a municipal corporation is not liable for damages which arise through its negligence in performing acts when it is acting in its *governmental* capacity, and that it is liable for negligence in performing acts which arise when it is acting in a *proprietary* capacity. The distinction between these two classes of actions of a municipal corporation has been explained by the Supreme Court of Illinois in the case of *Frazer v. City of Chicago*, 186 Ill. 480. In that case, the court at page 485, quoted with approval the language of the Supreme Court of Massachusetts as follows:

“In *Oliver v. Worcester*, 102 Mass. 489, the court said: ‘The distinction is well established between the

responsibilities of towns and cities for acts done in their public capacity in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, as the management of property and rights held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public. In the one case no private action lies unless it is expressly given; in the other there is an implied or common law liability for the negligence of the officers in the discharge of such duties.' "

The Supreme Court of Illinois has held that when the City of Chicago is engaged in the construction and operation of a water system for the purpose of supplying water to the inhabitants of the city to be used for domestic and miscellaneous purposes as well as for the prevention of fire, that the City is engaged in its proprietary capacity, as contra-distinguished from its governmental capacity, and therefore is liable for any injury to persons or damage to property sustained by negligent acts in respect thereto.

The Supreme Court of Illinois has further held that when engaged in the use of dynamite in the construction of a water tunnel, that the City is liable for all damage which is approximately caused by the use of dynamite as aforesaid irrespective of whether the damage is caused by debris being thrown directly upon the land of the person injured, or whether the damage is caused by vibrations in the earth or air.

In the case of *City of Chicago v. Selz, Schwab & Co.*, 202 Ill. 545, the court at page 550 said:

"The business of selling water to inhabitants and street sprinkling contractors is not an exercise of the police power, and the City is not exempt from liability for negligence in maintaining such system."

In the case of *The City of Joliet v. Harwood*, 86 Ill. 110, the court, at page 111, said:

"In this case the work which the contractor was required by the city to do was intrinsically dangerous, however carefully or skillfully done. The right of recovery

in this case does not rest upon a charge of negligence on the part of the contractor; it rests upon the fact that the city caused work to be done which was intrinsically dangerous—the natural (though not the necessary) consequence of which was the injury to plaintiff's property. In such case the city is responsible."

See also

City of Chicago v. Selz, Schwab & Co., 202 Ill. 545.

Normal School v. City, 271 Ill. 605.

25 L. R. A. (N. S.) 239 n.

McQuillin on Municipal Corporations, Section 2680.

Our Supreme Court has held that the City is liable for the use of dynamite in the construction of a tunnel when the result of the blasting was to cause vibrations in the earth which injured a building on the surface of the earth.

In the case of *Fitzsimmons & Connell Company v. Braun & Fitts*, 199 Ill. 390, the court, at page 394, said:

"The performance of the work of excavating the tunnel underneath the buildings of a populous city with dynamite was intrinsically dangerous, no matter how carefully and skillfully the explosions were conducted. The nature and power of dynamite as an explosive have been demonstrated by universal experience, and it is a matter of common knowledge that the use of dynamite as an explosive is intrinsically dangerous, and of this the courts will take judicial notice."

On page 396 in the same opinion, the court said:

"Though the law as to the liability arising in such instances does not seem to have been harmoniously declared in the courts of the different States to which we have referred, the rule in this jurisdiction was indicated by this court in the case of *City of Joliet v. Harwood*, 86 Ill. 110. In that case it appeared that it was necessary in the construction of a public work, that the blasting of rocks should be done in a public street of the city. The contractor used all due care, skill and caution in performing the work of blasting. A stone was thrown by the blast against a building of the plaintiff and injury thereby caused. Judgment was given against the city, and in affirming, we said: 'In this case the work

which the contractor was required by the city to do was intrinsically dangerous, however carefully or skillfully done. The right of recovery in this case does not rest upon a charge of negligence on the part of the contractor. It rests upon the fact that the city caused work to be done which was intrinsically dangerous, the natural (though not the necessary) consequence of which was the injury to plaintiff's property. In such case the city is responsible.' It is true that in that case there was an actual invasion of the property of the plaintiff, the explosion having precipitated a rock against his building; but liability for injuries caused by actual invasion of the property, or by the concussion or vibration of the earth or air, are within the doctrine there announced. If one who, for his own purposes and profit, undertakes to perform a work, by means of explosives, inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of such other, it is only by the merest subtlety of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth. There is no ground of substantial or practical distinction."

See also case of *City of Chicago v. Murdock*, 212 Ill. 9.

Although the coal bin located at the premises aforesaid was constructed in an unsubstantial manner, nevertheless, this does not in law constitute contributory negligence because a person is not required to anticipate blasting on the land of another, nor to construct his buildings in such way as to withstand the vibrations caused by blasting.

In conclusion, therefore, it is our recommendation that the claim of Dr. E. L. Cornell, 7245 Princeton avenue, for Thirty Dollars and Fifty cents be paid.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Whether the Sale of Lash's Bitters is a Violation of the Illinois Prohibition Act.

December 6, 1923.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

The Corporation Counsel has received a request from you to investigate a preparation known as Lash's Bitters, in order to ascertain whether the sale of this preparation constitutes a violation of the Illinois Prohibition Act. It is claimed by the manufacturers of Lash's Bitters that the said preparation is a medicine and not a beverage, and that consequently although it contains approximately 18 per cent of alcohol it does not come within the scope of the Prohibition Act.

In this connection we desire to call your attention to Section 2 of "An Act to restrict the manufacture, sale, transportation, possession and use of intoxicating liquor, aiding thereby in establishing uniformity in State and Federal Laws in regard thereto." This act is popularly known as the Illinois Prohibition Act. Section 2 of said Act is as follows:

"Section 2. When used in this Act, the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume *which are fit for use for beverage purposes*; * * *

The aforequoted section of the act shows that intoxicating liquor to come within the scope of the Illinois Prohibition Act must not only contain an excess of a given proportion of alcohol by volume, but must also be fit for use for beverage purposes. It is admitted by the manufacturers of Lash's Bitters that the said preparation contains 18 per cent alco-

hol by volume. The only remaining question, then, to be investigated, is whether this preparation is fit for beverage purposes. Since this is a question of fact which should properly be determined by a chemist, the matter has been referred to the Department of Health of the City of Chicago. Samples of Lash's Bitters which were furnished by the manufacturers and a sample of the said bitters which was purchased by an investigator from this office in a drug store were sent to the Department of Health with the request that the said department make a chemical analysis of the preparation and report its conclusions as to whether this preparation is fitted for beverage purposes. The report from the Department of Health, dated December 1, 1923, is as follows:

Herman N. Bundesen, M. D.
Commissioner of Health
CITY OF CHICAGO
BUREAU OF LABORATORIES
DEPARTMENT OF HEALTH

LABORATORY REPORT

December 1, 1923.

To Dr. Herman N. Bundesen,
Address Department of Health.
Specimen of Lash's Bitters
Submitted on Nov. 20, 1923.

For amount of cascara and other
laxatives, also opinion of same
for beverage purposes.

Report:

No chemical methods were found available for determining the amount of cascara sagrada or other laxatives in the sample. Physiological tests were made upon several chemists and on guinea pigs. Chemists consumed two ounces of the bitters without griping and three of them reported a slight intoxicating effect which lasted for about fifteen minutes. The laxative effect was noticeable in every case. The guinea pigs were fed from two to five mls of the bitters per day, and only in those fed four to five mls of the sample were any undue effects noticeable.

The sample obtained from the drug store and one of those obtained from the manufacturer were tested for extractive. One-hundred mls of the drug store sample contained 4.8460 grams and the manufacturer's sample contained 4.8474 grams per 100 mls, making an average of 4.8467 grams per 100 mls, or 22.06 grams per ounce.

Qualitative tests for cascara sagrada in Lash's Bitters were positive.

From results obtained upon the chemists, who consumed two ounces of the bitters, it is our opinion that Lash's Bitters, when taken direct, is unfit for beverage purposes.

By Direction of the Commissioner of Health.

F. O. TONNEY, M. D.,

Director of Laboratories and

M:

Research.

We believe that it is also revelant to this investigation to call attention to the fact that Don V. Parker, Prohibition Commissioner for the State of Ohio, has ruled that the sale of Lash's Bitters is not a violation of the Federal Prohibition Act unless the said Bitters are sold for beverage purposes. In the case of *State of Ohio v. Andy Keydoszius*, in the Court of Common Pleas of Montgomery County, Ohio, sitting at Dayton, it was held that the possession of Lash's Bitters by the defendant was not a violation of Section 6212-15 of the General Code of Ohio, and that the said Lash's Bitters were unfit for beverage purposes. Lash's Bitters is manufactured under a permit issued by the Federal Bureau of Internal Revenue under the National Prohibition Act, which requires that a preparation of this kind be unfit for use for beverage purposes before a permit is issued. Doctor Hugh McGuigan, Professor of Pharmacology and Therapeutics of the University of Illinois College of Medicine, Chicago, has, after experimentation, determined that Lash's Bitters are unfit for beverage purposes. On September 16, 1918, A. R. Todd, State Chemist of Michigan, examined Lash's Bitters and held them unfit for beverage purposes. Various other investigations by well-known chemists have been called to our attention, all of which concur in holding that Lash's Bitters cannot

be used as a beverage. In view of the report submitted by the Department of Health of the City of Chicago that this preparation is unfit for beverage purposes, we are of the opinion, for the reasons aforesaid, that its sale does not constitute a violation of the Illinois Prohibition Act.

It should be observed, however, that these conclusions are based upon the present chemical formula of Lash's Bitters, and should that formula ever be changed in such a way as to reduce the amount of medication of this preparation, a new analysis should be made.

You are therefore advised that the sale of Lash's Bitters, prepared according to its present formula should not be interfered with by the Police of the City of Chicago.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of City to Require Street Car Lines to Repave or Improve Their Right of Way.

December 6, 1923.

HON. U. S. SCHWARTZ, Chairman, Local Transportation Committee.

Dear Sir:

We beg leave to submit herein our reply to your letter of November 15, 1923, in respect to repavement of the right-of-way of the Chicago Railway Company on Noble street from Division street north to Blackhawk street, on Blackhawk street from Noble street west to Holt avenue, and on Holt avenue from Blackhawk street north to North avenue.

In your letter you ask, "What the City can do either in the removal of the street car tracks and repaving, or forcing the street car lines to improve their right of way."

The streets or portions of streets above mentioned are all contained in the original schedule of streets attached as "Exhibit A" to the Settlement Ordinance of February 11, 1907, granted to the Chicago Railways Company. Said ordinance being a contract between the City and the Company, the answers to your questions will depend upon the proper construction of that ordinance.

Section 8 of said ordinance contains the following provisions concerning the removal of tracks:

" * * * *If it shall hereafter cease to operate over any of its tracks or any portion thereof, it shall remove such unused tracks upon the order of the City Council.* Failure to operate cars for the carriage of passengers at least once each way within every hour of each day between the hours of six (6) a. m. and eight (8) p. m. over any part of a street or public place in which tracks of the Company are laid, shall be treated as a cessation of operation of its tracks in such part of street or public place within the meaning of this section, unless such operation is interfered with by unavoidable accidents, labor strikes or litigation brought without connivance of the Company; provided, however, that the foregoing provisions of this section shall not be construed to require or authorize the removal of curves or turnouts or of connecting tracks specifically authorized by this ordinance or the exhibits hereto to be constructed and maintained for use during rush hours or for emergency use in case of fire or accident, or such tracks as may be necessary for a connection with the Company's property used for street railway purposes.

"The City shall have the right by ordinance to require the Company to remove any tracks or portions thereof, the further maintenance of which is at any time no longer warranted by the traffic, or reasonably required in the operation of the said street railway system, providing that the Company shall not be required to remove such tracks but may maintain or reconstruct and operate the same during the life of this grant so long as or whenever the City shall permit the construction or

operation of any street railways upon the streets or parts of streets respectively from which such tracks have been so required to be removed and in every case of removal of tracks as aforesaid, the Company shall restore the street or public way to the condition of the other portions thereof, all at its own cost, such cost to be treated as an operating expense.

"If the Company shall fail within a reasonable time (not to exceed 30 days) to remove any such tracks on order of the Commissioner of Public Works, the said City may remove them, charging the expense thereof to the Company; provided, however, that nothing in this section contained shall relieve the Company from its obligations at all times to render adequate service on its street railways."

It is our opinion that the specific enumeration of certain conditions which the City may compel the removal of the Company's tracks excludes any right of the City to compel removal of tracks under different conditions as long as both the City and the Company are endeavoring to abide by the terms of the contract. We are informed by the Department of Public Service that the Company maintains a daily service over said tracks and right-of-way between the hours of 6 a. m. and 8:45 p. m. at intervals of approximately sixteen minutes. It would appear, therefore, that the removal of the tracks could not be brought within the terms of the section above quoted.

The duties of the Company in respect to paving and repaving its right-of-way are set out at considerable length in "Exhibit B" attached to the ordinance of 1907 and made a part thereof. The following language taken from said "Exhibit B" is pertinent to the question now under discussion:

"The Company, as respects filling, grading, paving, keeping in repair, sweeping, sprinkling, keeping clean, or otherwise improving the streets or parts of streets occupied by its railway, shall fill, grade, pave, keep in repair, sweep, sprinkle, and keep clean and free from snow eight (8) feet in width of all streets and public ways, or portions thereof, occupied by it with a single track railway, and sixteen (16) feet in width of all streets

and public railways, or portions thereof, occupied by it with a double track railway.

* * * * *

“The Company, upon the order of the Commissioner of Public Works, and approval of the Board of Supervising Engineers, shall pave, repave, or repair the portions of the streets and public ways which by this grant it is required to keep paved and in repair, whenever and as often as the same shall reasonably require paving, repaving or repairing, and shall at all times keep the surface of all of its paving at least up to the top of the rail. * * * ”

We are informed by Mr. Fisher of the Bureau of Streets, Department of Public Works, that when the Commissioner of Public Works has been apprised (by Council order or otherwise) that certain portions of the street railway right-of-way are in a dangerous state of disrepair and should be paved or otherwise improved notice is given by the Commissioner to the Board of Supervising Engineers, and that Board causes such improvements to be made.

While the “forfeiture case” and the “forfeiture ordinance” controlled the policy of the City in relation to street railway companies, the Commissioner, of course, could not give any such notice or make any demand upon the Companies or the Board of Supervising Engineers lest he should imperil the position of the City in respect to the claim of forfeiture. However, the Mayor and the Council have rescinded the “forfeiture ordinance” and dismissed the “forfeiture case,” and the Commissioner of Public Works has been informed that he may now issue permits or make demands upon the Companies or the Board of Supervising Engineers as provided by the ordinance of 1907.

We are of the opinion, therefore, that the former procedure may be properly followed in the present instance.

Respectfully submitted,

C. M. DOTY,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Garage Near House of Good Shepherd.

Chicago, December 6, 1923.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

In your letter of the 4th instant you ask whether a permit may issue for a public garage to be located at 3751-53 North Clark street and 3755 N. Racine avenue, within 200 feet of the "House of Good Shepherd." The question is asked because the institution is licensed as a "home for children, etc," under Section 1873 of The Chicago Municipal Code of 1922, and you are in doubt as to whether the provisions of Section 246, which prohibits the erection of a public garage within 200 feet of a church, hospital or school, apply in the case of a "home."

The House of Good Shepherd is properly classed as a "home," because the definition given in Section 1873 expressly includes "refuges and shelters." The definition of "hospital," in Section 1850, however, does not include such an institution.

Under the well recognized rule that a penal ordinance or an ordinance in derogation of common law rights must be strictly construed, the word "hospital" as used in Section 246 cannot be held to include a "home." That would not only be extending by implication the meaning of the words used, contrary to the rule just mentioned, but it would be giving a different definition to the word "hospital" than is given in Section 1850.

In addition to the above, we call attention to the fact that while the House of Good Shepherd is classed as a "home" for the purposes of the article providing for licenses, it really belongs to the "rescue or sheltering institutions," which are put into a class with reformatories by Section 922.

We are therefore of the opinion that the proposed garage may be located in the place mentioned if there is no other obstacle to prevent it.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of the City in the Alley Immediately South of
and Parallel with Van Buren Street in West Half
of Block Bounded by Van Buren, Congress,
Wabash and Michigan.**

December 7, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of August 27, 1923, relative to the above matter.

We have examined plats and records that were accessible to us. We received a report of the Paving Assessor of the Board of Local Improvements, concerning the above.

In June, 1853, the above alley was opened as an alley. It was used exclusively as such ever since by the general public. At no time has the public been advised that this was claimed to be a private alley. The report of the Paving Assessor of the Board of Local Improvements shows that when Wabash avenue was paved at different times, this alley was not assessed, but the paving of the alley intersection and the alley return was spread over the entire improvement.

We are of the opinion that the general public has a right to use this alley and this right of user should not in any manner be abridged.

Yours very truly,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Erection of Store Within District Zone for Apartment When District Boundary Line Divides a Lot in Single Ownership.

December 10, 1923.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

I beg to acknowledge receipt of your letter of December 4, 1923, asking the advice of this department as to the proper course for you to pursue in relation to the premises at 4744 Washington boulevard.

It appears from your letter that the premises at 4744 Washington boulevard at the present time are improved with a two-story apartment building, and that you have issued a permit for a brick front addition for store purposes to the said building.

Inasmuch as 4744 Washington boulevard is entirely within an apartment district under the ordinance, no permit could lawfully be issued for a building for commercial purposes at that address except it fall within Paragraph (d) of Section 23 of the Zoning Ordinance, which reads as follows:

“Where a district boundary line as defined in this section or as shown on the use or volume district map

divides a lot in single ownership at the time of the passage of this ordinance, the use or volume authorized on the least restricted portion of such lot shall be construed as extending to the entire lot, provided this does not extend more than 25 feet beyond the said boundary line of the district in which such use is authorized. The use or volume so extended shall be deemed to be conforming."

From the affidavits, etc., submitted with your letter, it appears that the 50 feet immediately west of 4744 Washington boulevard are in a commercial district, and are at the present time improved with a two-story brick garage and auto salesroom.

It appears further from the affidavits submitted that Le Roy S. Warner is the owner of the property on which is located the said two-story brick garage.

It further appears from the affidavits submitted with your letter that the wife of the said Le Roy S. Warner at the present time has a contract to purchase the said premises at 4744 Washington boulevard, and that certain monthly installments coming due under said contract have been paid.

The 50 feet immediately adjoining and to the west of 4744 Washington boulevard, improved at the present time with a two-story garage and auto salesroom, are in a commercial district, and as I understand it, it is sought to extend this commercial district to the 25 feet immediately to the east on the theory that the lot on which the auto garage is located and the lot at 4744 Washington boulevard are in single ownership.

A lot, under the ordinance, is defined as follows:

"Lot—A parcel of land or premises occupied, or which it is contemplated shall be occupied, by one building with its usual auxiliary buildings or uses customarily incident to it, including such open spaces as are required by this ordinance and such open spaces as are arranged and designed to be used in connection with such building, shall be deemed a lot for the purposes of this ordinance. A corner lot shall be deemed to be that property which has an area not in excess of 8,000 square

feet, and which abuts on two streets making an angle on the lot side of not greater than 120 degrees.''

From the contents of your letter, and from the affidavits submitted, it does not appear that a use district boundary line divides a lot which was in single ownership at the time of the passage of the Zoning Ordinance. Such being the case, it would seem to be unnecessary to discuss any other phase of the subject, and it is my judgment that you were without authority under the Zoning Ordinance to issue a permit for a brick front addition for store purposes to the building at 4744 Washington boulevard, which is in an apartment district.

Yours very truly,

WM. L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Authority of Board of Education to Appoint a Non-resident of the State to Position of Assistant Supervisor of Playgrounds—Applicability of City Civil Service.

December 11, 1923.

HON. OSCAR F. NELSON, Alderman 46th Ward.

Dear Sir:

Your request of the 7th ult. to be advised upon the authority of the Board of Education of Chicago to make the appointment of Charles E. English of Wilkesbarre, Pa., Assistant Supervisor of Playgrounds, was referred to me for consideration and reply.

The Playground Law:

The Board of Education derives its authority in the matter of public playgrounds from an Act of the legislature, approved June 25, 1921, and amended June 26, 1923.

The Act of 1921 declared:

“Section 1. That the Board of Education in any City having a population exceeding 100,000 inhabitants shall take control and management of all public playgrounds now owned or hereafter acquired by any such city, which are adjacent to or connected with any public school in such city and shall equip, maintain and operate the same for the moral, intellectual and physical welfare of the children and persons using them; the title to all lands occupied as such playgrounds shall vest in and be held by such city in trust for the use of schools: Provided, however, that nothing herein contained shall prevent any such city from owning and operating parks, bathing beaches, municipal piers, and athletic fields as is now or may hereafter be provided by law.”

Section 2 provided for an annual levy in addition to the amount of money authorized to be raised by taxation not exceeding three-tenths of one mill on each dollar on taxable property embraced within such city, for the purpose of equipping, maintaining and operating playgrounds under the control of such Board of Education. Such tax not to be subject to any scaling process.

This section was amended by an Act of 1923 describing the playgrounds as adjacent to or connected with any public school under the control of such Board of Education or school district. The tax to be known as “school, playground tax” and to be in addition to the maximum of all other taxes. (Approved June 26, 1923, Laws of 1923, page 606.)
The Powers and Duties of the Board of Education Therein:

No provision is made in these Playground Acts as to qualifications or selections of teachers or instructors necessary to the operation of them, and their appointment obviously will be controlled by the provisions of the school laws for

the appointment of teachers and employes in the teaching force.

The school law applicable to the City of Chicago empowers the board of education to elect its officers and appoint certain designated employes (Ch. 122, Sec. 152) and it is declared that

“All appointments of other employes of the board of education, except as herein otherwise provided, shall be made pursuant to the provisions of the civil service law. * * * Teachers shall be exempt from the provisions of this section.”

Ch. 122, Sec. 152, Smith-Hurd Ill. R. S. 1923,
Schools.

The superintendent of schools shall

“Prescribe and control, subject to the approval of the Board of Education, the courses of study, text books, educational apparatus and equipment, discipline in and conduct of the schools, and shall perform such other duties as the Board may by rule prescribe pertaining to the education department appointments, promotions and transfers of teachers, principals, assistant and district superintendents, *and all other employes in the teaching force*, shall be made, by the Board of Education, only upon the recommendation of the superintendent of schools, unless it be by a two-thirds vote of all the members of the Board.”

Id., Sec. 158.

The Board of Education is required to exercise general supervision and management of the public education and shall have power to provide among other schools:

“Schools or classes in manual training, construc-tural and vocational teaching, domestic arts and physical culture, and extension schools and lecture courses and also other educational courses and facilities, including *playground maintenance*.”

Id., Sec. 159.

“The Board of Education subject to the limitations contained in the Act has the power to prescribe the courses and methods of study in the various schools and

to employ teachers or other educational employes and fix their compensation.”

Id., Sec. 160.

Appointments to and Promotions in the Teaching Force:

“161. Board of Examiners—Appointment and promotion of teachers.) Section 138. A board of three examiners is hereby constituted, whose duty it shall be to examine all applicants who are required to hold certificates to teach and the board of education shall issue gratuitously to those who pass a required test of character, scholarship and general fitness, such certificates to teach as they are found entitled to receive. Such board of examiners shall consist of the superintendent of schools together with two persons approved and appointed by the board of education upon the nomination of the superintendent of schools. The board of examiners shall hold such examinations as the board of education may prescribe, upon the recommendation of the superintendent of schools and shall prepare all necessary eligible lists, which shall be kept in the office of the superintendent of schools and be open to public inspection. Members of said board of examiners shall hold office for a term of two years. Appointments and promotions of teachers, principals and other educational employes shall be made for merit only, and after satisfactory service for a probationary period of three years (during which period the board may dismiss or discharge any such probationary employe upon the recommendation, accompanied by the written reasons therefor, of the superintendent of schools), appointments of teachers and principals shall become permanent, subject to the rules of the board concerning conduct and efficiency, and subject to removal for cause in the manner provided by Section 161 of this act: Provided, however, that in determining the duration of the probationary period of employment in this section specified, there shall be included the time of past service of all teachers and principals and other educational employes who are in the schools at the time, or who have been therein within five years immediately preceding the time this act goes into effect: And further provided, that when any teacher or principal, who has been promoted to the position of assistant or district superintendent or a member of the board of examiners, is relieved of the duties of such position,

such person shall be reinstated in the position from which he was promoted. The words 'teachers and principals' shall be construed to include all members of the teaching force except the superintendent of schools, assistant and district superintendents and members of the board of examiners. (As amended by act approved April 20, 1917.)"

Under this section the director in question is a "probationary employe" subject to dismissal during the probationary period, and we understand that the appointment is such in fact.

Definitions:

Another statutory definition of the term "teacher" is found in the Teachers' State Pension Retirement Fund Act, approved June 30, 1921, as found in that act, which is as follows:

"The term 'teacher' as used in this Act shall include any teacher, teacher's secretary, substitute, supervisor, principal, superintendent, who shall teach or is employed in the public schools of this State."

Id., Section 612.

Residence of the applicants for certificates is not made a qualification, and it is held by the courts that the policies of the board are not controlled by the courts unless embodied in action so arbitrary as to be unlawful.

(See decisions, *infra*.)

I note in the requirements for *state* certificates granted by the Superintendent of Public Instruction the requirement for "three years successful teaching, two of which shall have been in the state."

Ch. 122, Sec. 482 (Act of 1913).

And by an act approved June 28, 1919, the superintendent is authorized "to recognize and honor any State certificate of another state obtained under conditions similar to those in Illinois," and the county superintendent may recognize and honor any certificate of another State obtained

under similar conditions to those in Illinois, under such rules as may be prescribed by the Examining Board.

Id., Section 500.

CIVIL SERVICE LAWS:

The state civil service and the civil service of cities acts of the legislature contain respectively the following provisions with reference to schools:

"13. Exemptions from classified civil service. Section 11. The following officers, positions and places of employment shall be exempt from the classified civil services of the state:

* * * * *

"(8) All presidents, deans, principals, professors, instructors, scientific staff and *other teachers* of the University of Illinois and of the State normal schools."

* * * * *

Smith-Hurd Stat. 1923, Ch. 24½.

"50. Section 11. Exempts * * * members of any board of education, the superintendent and *teachers of schools*, * * *."

Id.

Civil Service Com. Report—Year 1920, p. 146.

And head assistants in grammar and high schools and of "department, Chicago Normal College;" * * *
"teacher, physical education, music, art, etc."

Same Report, p. 134.

The school law further declares that:

"The powers of the Board of Education are to be construed as being all the powers that may be requisite or proper for the maintenance and the fullest development of an efficient public school system, not in consistence with the general provisions of the School Board of the State which apply to all school districts."

Section 162, Ch. 122.

With the discretion permitted the board of education in the exercise of the powers conferred and in the performance of the duties imposed, the courts will not, except in pos-

sible extreme cases interfere. The case of *People v. Fursman*, (278 Ill. 318) well illustrates this doctrine.

This appeal was taken from a decree enjoining the Board of Education of the City of Chicago from enforcing a rule of the Board prohibiting membership of teachers in labor unions, or in organizations of teachers affiliated with a trade union or a federation or association of trade unions. The question was whether the Board had the right to discriminate in the selection of teachers between those who are members and those who are not members of any such federation or union, and whether its action violated any constitutional or statutory provision.

The court in its opinion said that:

“As counsel for appellee states, this is a question of first impression in this State. While a large number of authorities have been cited on both sides, none of them are in point or helpful in determining the question at issue. Elaborate arguments have been presented on both sides, but the question, after all, is a simple one, and presents no great difficulties. By the statute the board of education in cities having a population of 100,000 or more is given complete control of the schools of the city. Among its powers is that of employing teachers and fixing the amount of their compensation. It is empowered to enact such ordinances as may be deemed necessary and expedient for the proper management of the schools. The board consists of twenty-one members, appointed by the mayor of the city. The tenure of office is three years, the terms of office of seven of the members expiring each year. A new board is thus brought into existence each year. The board has no power to make contracts for the employment of teachers to extend beyond the ensuing year. *Stevenson v. School Directors*, 87 Ill. 255; *Davis v. School Directors*, 92 Ill. 293. A new contract must be made each year with such teachers as it desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all. The board is responsible for its action only to the people of the city, from whom, through the mayor, the members have received their appointments.

It is no infringement upon the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is a fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action. It is free to contract with whomsoever it chooses. Neither the Constitution nor the statute places any restriction upon this right of the board to contract, and no one has any grievance which the courts will recognize simply because the board of education refuses to contract with him or her. Questions of policy are solely for the determination of the board, and when they have once been determined by it the courts will not inquire into their propriety.

"The existence of a teachers' pension fund in the City of Chicago does not restrict the Board of Education in its right to select such persons as teachers as it may desire to employ, nor does it confer upon one who has been a contributor to such fund any right to demand that he or she be re-employed. The only right upon which a contributor to the fund can insist in case the board concludes that it will not re-employ him or her is the right to receive at once the money he or she may have contributed to the fund. Hurd's Stat. 1916, Ch. 122, Sec. 161.

"In enacting this ordinance or rule the Board of Education did not interfere with the rights of any citizen of the City of Chicago, and it has the right to enforce the rule.

"The decree of the Superior Court is reversed, and the cause is remanded, with directions to dissolve the injunction and dismiss the bill."

Two justices "specially concurring" emphasize that a rule must not be purely arbitrary.

In a note to this case in L. R. A. 1917 E. 1073, it is said that very little judicial authority upon the power upon the local school board as to qualifications or conditions of employment of teachers exists, but that a similar decision appears in *Frederick v. Owens*, 35 Ohio, C. C. 536, and quotes therefrom as follows:

“The law prescribes the qualifications of teachers and provides that teachers already in the schools shall be given preference in the matter of appointment as against persons who have not been appointed to teach. Aside from these conditions imposed, the statute makes no attempt to control or regulate the discretion of the superintendent and of the Board of Education in the selection of teachers, and the whole subject being committed to their sound discretion. * * *”

The Illinois school law commands “all boards of education to provide for the teaching of physical training.” (Ch. 122, Sec. 522, Act of 1915.)

And where there have been no statutes the courts have held that School Boards may provide for the physical as well as the mental education of the pupils, and it follows that, if they provide physical education, they must within reasonable limits as to expense and time of pupils, provide for determining what is proper and beneficial for these pupils by all reasonable means including an examination, physical as well as mental, by suitable persons, and for proper physical exercises and development to overcome defects. The persons so employed may be professional medical men and nurses and for the inspection of the children directing what is to be done for their physical education, they are as certainly teachers as are those principals of large schools who do not actually teach.

Hallett et al., as President, etc., of School District No. 1 v. Post Printing & Publishing Co., a taxpayer, etc., 192 Pac. 658 Colo. Sup. at 1920.

CONCLUSION:

Recurring to the positive enactments placing the absolute duty upon the board to maintain and operate these playgrounds without direction as to methods and policies; together with the duty to teach physical training; and the power to certify and appoint teachers and other educational employees (Section 161, *supra*) and exempting them from the civil service laws which are applicable to certain other

school employees, it would seem to be undeniable that the legislature in so doing intended that the physical education or a part thereof should be and would be taught on these playgrounds and the teachers and instructors should not be members of the city's classified civil service.

It is to be remembered too that while under the city's management these playgrounds were chiefly attended in the evenings and by men and women, whereas now, as we have ascertained, children are the chief beneficiaries, and it is of the greatest importance that the attendants should be those trained in the instructing of children.

We are therefore of the opinion that the appointment of the present director Mr. Charles E. English a nonresident of the State is not invalid for the supposed reasons that such position must be filled by the city's civil service commission, or because he is not a resident of the city.

Yours very truly,

CORA B. HIRTZEL,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of Widow to Pension Whose Husband's Right
to Firemen's Pension Became Vested When the
Law of 1877 Was in Force, but Whose
Husband Died When the Law
of 1917 was in Force.**

December 13, 1923.

HON. AL F. GORMAN, Secretary, Firemen's Pension Fund.

Dear Sir:

Your letter of December 3, 1923, transmitting supplementary petition of Margaret A. Flynn, widow of Frank B. Flynn, has been referred to me.

The Act of 1877 establishing the Police and Firemen's Relief Fund provides for the payment of pension to members of the department permanently disabled or dying from the effects of injuries received while in the discharge of duty and to their widows or children, or to the widows and children of members of the department who shall die after ten years of service. The following are Sections 6 and 7 of the Act of 1877:

"if any member of the police or fire departments, while in the actual performance of duty or other person entitled to the benefits of this fund as hereinafter provided, shall become permanently disabled, so as to render proper his retirement from membership, a sum not exceeding six hundred dollars (\$600) per annum, or such less sum as, in the judgment of the board, the fund will justify, shall be paid to such member out of said fund; or if any member, while in the actual discharge of duty shall be killed, or shall die from the immediate effects of an injury received by him while in such discharge of duty, or shall die after ten years' service in the police or fire departments, and shall leave a widow, or if no widow, any child or children under the age of sixteen (16) years, a sum not exceeding six hundred (\$600) dollars per annum, or such less sum as, in the judgment of the board, the condition of the fund will justify, shall be paid to such widow so long as she shall remain unmarried, or to such child or children while under the age of sixteen years."

"Sec. 7. Any person who shall have served in either the police or fire departments of said city or village for the full term of ten (10) years, and shall have paid into the fund hereby provided for all assessments regularly made upon him by the board of trustees as required by this Act, and the regulations of the said board of trustees passed in pursuance of this Act, and shall have complied with all the rules and regulations lawfully established by the board of trustees in the same manner, as if such person was an active member in said police or fire department, may continue his membership in this organization, and be entitled to the benefits of this fund after he shall have ceased to be a member in either said police or fire department, by complying with all the provisions of this Act, relative to the payment of assessments, etc., the same as prior to his ceasing to be

a member of said departments, and the widow or children of such person shall be entitled to all benefits hereby secured to other members of this organization."

The Act was subsequently amended in 1887 and supersedes the Act of 1877. Section 9 of the later Act is as follows:

"Section 9. The widows and orphans of deceased firemen and retired members of the fire department, who are now entitled to pension or annuity under the provisions of an Act entitled 'An Act for the relief of disabled members of the police and fire departments in cities and villages,' approved May 24, 1877, as amended, shall be entitled to the benefits, pensions and annuities provided for by this Act: *Provided*, such persons shall thereupon cease to receive pensions, relief or benefits under said Act of May 24, 1877."

Subsequent acts amending the Firemen's Pension Law contained a similar clause to Section 9 last quoted. The Act of 1917 contains the following clause:

"BENEFICIARIES UNDER PRIOR ACTS.) Sec. 14. The widows, orphans and dependent parents of deceased firemen and all retired firemen who are receiving or entitled to receive pensions under any other Firemen's Pension Law in force in such city at the time this Act shall become effective, shall be entitled to the benefits and pensions provided for by this Act and none other from the time that this Act shall become effective in such city."

The question of whether the rights of firemen and their widows or children under the Act of 1877 have been saved to them in the subsequent Firemen's Pension Acts, has been decided by the courts of this state. In the case of *Eddy v. People*, 218 Ill. 611, the court, on page 617, says:

"Section 12 of the Act of 1887, which act superseded the amendatory act of 1879 as to cities of the class of Chicago, provides that a policemen's widow who was a pensioner under the act of 1877, as amended by the act of 1879, upon the taking effect of the act of 1887 shall receive no benefit under said amendatory act of 1879 but shall be entitled to the benefits of the act of 1887. As we have seen, the relator was entitled to receive a pension under the act of 1877, as amended in 1879. Her right to a pension under that act was taken away, and

in lieu thereof she was made a pensioner under the act of 1887 by the express terms of that act. The amendment passed in 1903 in no way abridged the rights of the relator, and on the 17th day of October, 1903, in our view she was entitled to a pension under said Section 12 of the act of 1887. The appellants, therefore, wrongfully struck her name from the pension roll and refused to pay her her pension, and the Circuit and Appellate Courts rightfully adjudged that her name should again be placed upon the pension roll and her pension paid to her from the date when payment to her was wrongfully suspended."

To the same affect is the case of *O'Connor v. Trustees Firemen's Pension Fund*, 155 Ill. App. 460.

The petition of Margaret A. Flynn shows that her husband, Frank B. Flynn, now deceased, was a member of the Fire Department from February, 1874, to March, 1887, and the letter of the Fire Marshal dated October 15, 1923, shows that on March 31, 1887, said Frank B. Flynn resigned from the department. His service covered a period of more than ten years and under the Act of 1877 the right of his widow to a pension became fixed. Her right to draw a pension, however, could not accrue until his death which, according to the petition, occurred on June 9, 1918. Section 5 of the Act of 1917 requires the Board to hear and determine all applications for pensions and provides that its decision shall be final and conclusive, and not subject to review or reversal except by the Board.

I am of the opinion that the Board should investigate the facts set forth in the petition of Mrs. Flynn, and if upon a hearing the Board finds that Frank B. Flynn in his lifetime complied with all the provisions of the Act of 1877, it should order her name placed upon the pension roll under the terms of the Act of 1917.

Yours very truly,

FRANK M. PADDEN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Police Captain Who Was Discharged but Later Reinstated Under Court Order Must Pay Back Payments into Pension Fund in Order to Restore Him to His Pension Rights.

December 18, 1923.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit, Fund.

Dear Sir:

Replying to your inquiry as to the method of computing the moneys to be paid into the Policemen's Annuity and Benefit Fund by Capt. Dennis M. Malloy, following his restoration to active service, I submit the following:

I am informed that Capt. Dennis M. Malloy was suspended July 9, 1921, was discharged August 5, 1921, and reinstated on May 15, 1923; that on September 30, 1922, a pension check was issued to him in the amount of \$647.72, and subsequent payments made to him of \$91.66 per month for eight (8) months thereafter, up to and including the month of May, 1923. I am also informed by Mr. Cassidy that the deductions which ordinarily would have been made from Capt. Malloy's salary had he been in continuous service from July 9, 1921 to May 15, 1923, would have amounted to \$209.54, without interest.

Capt. Malloy having been restored to service, if he is to receive back pay for the period of his inactivity, should repay to the Policemen's Annuity and Benefit Fund the following amounts:

- 1—The sum of \$647.72, paid to him on September 30, 1922.
- 2—Interest on the next above amount at 4% per annum, which, computed to the end of December of this year, amounts to \$32.38.

- 3—The eight (8) pension payments of \$91.66 each, being a total of \$733.28.
- 4—Interest on the individual pension payments at 4% per annum to date of his restoration to service, namely, May 15th, 1923. This interest I have computed in the amount of \$9.77.
- 5—Interest on the total sum of \$733.28 from May 15, 1923, to December 31, 1923, which interest I have computed in the sum of \$19.33.
- 6—The sum of \$209.54, being the salary deductions which would have been placed to his credit in the Annuity and Benefit Fund had he been in continuously in service.
- 7—Interest on the individual salary deductions from July 9, 1921, to May 15, 1923, at 4% per annum, which interest I have computed in the amount of \$7.68.
- 8—Interest on the total sum of \$209.54 from May 15, 1923, to December 31, 1923, which interest I have computed in the sum of \$5.74.

The foregoing amounts, added together, make a grand total of \$1,664.94 to be repaid by Capt. Dennis M. Malloy into the Policemen's Annuity and Benefit Fund.

Respectfully,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Legal Status of the Board of Trustees of the Firemen's Pension Fund—Attorney of the Board Subject to the Corporation Counsel.

December 19, 1923.

HON. AL F. GORMAN, Secretary of the Board of Trustees of the Firemen's Pension Fund.

Dear Sir:

We have received a communication from you advising us that at a meeting of the Board of Trustees of the Fire-

men's Pension Fund held on November 30, 1923, a resolution was passed requesting the Corporation Counsel to furnish the Board with an opinion concerning the operation of the pension law with regard to the legal relationship which is thereby created between the Board of Trustees of the Firemen's Pension Fund and the City of Chicago and especially with regard to the provisions of clause (a) of Section 5 and the provision of clause (f) of Section 5 relative to the employment by the board of an attorney.

The principal question presented for consideration is whether the Board of Trustees of the Firemen's Pension Fund is a body politic and corporate which is a distinct entity existing independent of the City of Chicago or whether the said board is a municipal agency and a part of the city government of the City of Chicago. The determination of this question will determine the proper interpretation to be placed upon the various provisions in Section 5 of the pension law prescribing the powers of the Board of Trustees.

The following provisions of "an act to provide for a Firemen's Pension Fund and to create a board of trustees to administer said fund in cities having a population exceeding two hundred thousand (200,000) inhabitants," are germane to this inquiry:

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That in each city whose population exceeds two hundred thousand (200,000) inhabitants, having a paid fire department, there is hereby created a Firemen's Pension Fund which shall be collected and administered according to the provisions of this Act.

"Sec. 2. Said pension fund shall consist of the following items which shall be set apart and placed to the credit of said pension fund:

"(a) Two and one-half per centum of the salary or wages of each fireman to be retained or deducted by the fiscal officers of the city before any part of said salary or wages shall be paid to said firemen.

"(b) Five per centum of an amount equal to the monthly salary or wages of each fireman, attached to his rank at the time of his retirement after twenty (20)

years' service under the provisions of this Act, which shall be paid monthly by such retired fireman to the treasurer of the Board of Trustees hereinafter created from the time of such retirement and until he shall reach the age of fifty (50) years.

"(c) All fines and penalties imposed upon firemen for breach of any rule of the fire department.

"(d) All rewards in moneys, fees, gifts and emoluments that may be paid or given for or on account of extraordinary services by the fire department or any member thereof (except when allowed to be retained by competitive award).

"(e) All taxes collected for the Firemen's Pension Fund pursuant to the levy hereinafter authorized.

"(f) All moneys or property acquired from any source by the Board of Trustees hereinafter created under the powers granted to said board.

"The city council of such city shall levy annually a tax for the purpose of providing revenue for the pension fund hereby created, of five-tenths of a mill on the dollar on all taxable property of such city. Said tax shall be in addition to all other taxes which such city is now or hereafter may be authorized to levy upon the aggregate valuation of all property within such city, and shall be levied and collected in like manner with the general taxes of such city; and the county clerk in reducing tax levies under the provisions of Section 2 of an Act entitled, 'an Act concerning the levy and extension of taxes,' approved May 9, 1901, in force July 1, 1901, as subsequently amended, shall not consider the tax herein authorized as a part of the general taxes levied for city purposes and shall not include the same in the limitation of three per cent of the assessed valuation upon which taxes are required to be extended.

"It shall be the duty of the corporate officers of such city who are or may hereafter be authorized by law to draw warrants upon the treasurer of said city, upon request made in writing by the Board of Trustees hereinafter created, to draw warrants upon the treasurer of such city payable to the treasurer of said board for all funds in the hands of the treasurer of such city belonging to such pension fund.

"Sec. 3. That in each such city there is hereby created a body politic and corporate, under the name and style of 'The Board of Trustees of the Firemen's Pension Fund of the City of (name),' which shall have ex-

clusive control and management of the firemen's pension fund. Said board shall be composed of the city treasurer, city clerk, marshal or chief officer of the fire department, and the comptroller or chief officer of the finance department of said city and three other persons who shall be chosen from the firemen who have been duly retired under this Act. The members of said board to be chosen from the active firemen shall be elected by ballot at a biennial election, at which election all active firemen of said city shall be entitled to vote; and the members of said board to be chosen from among the firemen who have been duly retired as aforesaid shall be elected by ballot at a biennial election, at which election all firemen retired under this Act shall be entitled to vote.

"The election or elections in this section provided for, shall be held on the 3rd Monday in April, under the Australian ballot system, at such place or places in said city and under such rules and regulations as shall be prescribed by the board: Provided, that no person entitled to vote shall cast more than one vote at such election. In the event of the death, resignation, failure or inability to act of any member of said board, elected under the provisions hereof, the successor to such member shall be elected at a special election which shall be called by said board and shall be conducted in the same manner as the biennial election hereunder.

"The said board shall elect from their number a president. The city treasurer shall be ex-officio the treasurer of said board and the city clerk shall be ex-officio secretary of said board.

"The said Board of Trustees shall submit a report, at least once each year, to the Superintendent of Insurance of this State, and the said Superintendent of Insurance shall prescribe the form for such reports, the matter which they shall contain, and the times when they shall be submitted, and said Superintendent of Insurance shall report the information so submitted to him or a comprehensive summary thereof, to the Governor of this State at least once each year. The said Superintendent of Insurance shall also prescribe a system of records and accounting to be used in the management of this fund.

"Sec. 4. The members of the Board of Trustees of the Firemen's Pension Fund of any such city holding office under any other firemen's pension law existing at

the time this Act shall become effective, shall serve as members of the board hereby created for the terms for which they were respectively appointed or elected and until such time as their successors are respectively appointed or elected and qualified as herein provided. All rights and property of every kind and description which are vested in the board existing at the time this Act shall become effective shall be deemed and held to be vested in the board created under the provisions of this Act; and no rights or liabilities, suit or prosecution of any kind, either in favor of or against said board, existing at the time this Act shall become effective, shall be affected by the transfer of the Firemen's Pension Fund from the control of one board to the other, but the same shall stand and progress as if no change had been made.

"Section 5. Said board shall have power:

"(a) To hear and determine all applications for pensions and to suspend the payment of pensions under this Act, and its decisions in such matters shall be final and conclusive and not subject to review or reversal except by the board.

"(b) To compel witnesses to attend and testify before it upon all matters connected with the operation of this Act in the same manner as is or may be provided by law for the taking of testimony before masters in chancery, and the president or any member of said board is hereby authorized to administer oaths to such witnesses.

"(c) To take by gift, grant, devise or bequest any money, real estate, personal property or other valuable thing.

"(d) To establish and maintain a fund in reserve and to invest said fund, or any part thereof, in the name of said board in interest bearing bonds of the United States, of the State of Illinois, or of any county or municipal corporation of the State of Illinois.

"(e) To sell or dispose of, in any manner that said board in its judgment deems proper, any or all assets of any kind, which are in the possession or under the control of said board.

"(f) To employ a physician, counsel or attorney and such clerical aid as may be necessary.

"(g) To provide for the payment from said pension fund all moneys which may be necessary for the expenses of the board.

“(h) To make all needful rules and regulations for its government in the discharge of its duties.

“It shall be the duty of the board:

“(a) To order payments to be made from the Firemen’s Pension Fund all persons entitled thereto under the provisions of this act.

“(b) To order that payments of pensions to firemen retired on account of disability be suspended whenever said board shall be satisfied that such disability no longer exists.

“(c) To report to the city council before the first Monday of September of each year the amount of taxes necessary to be levied to carry out the provisions of this Act for the following fiscal year.

“(d) To keep a record of all its meetings and proceedings.

“(e) To require every fireman retired on account of disability to be examined at least once a year by a physician to be selected by the board, and to require said physician to report to the board the physical and mental condition of all such firemen examined by him.”

It will be observed that the foregoing sections of the pension law of 1917 provide for the creation of a pension fund and provide that the City Council of the city shall levy a tax for the purpose of creating said fund. Section 3 of said act creates the Board of Trustees of the Firemen’s Pension Fund, which is expressly made “a body politic and corporate,” the members of which, other than the ex officio members, are elected by the active firemen in the city. It is provided in Section 5 (a) of said Act that the said Board shall hear and determine all applications for pensions and to suspend the payment of pensions and that its decisions in such matters shall be final and not subject to review. Section 5 (f) provides that the Board shall have power to employ counsel or an attorney, as well as other employees.

In contradistinction to the aforequoted provisions of the pension law is Section 7 of “an Act to amend an act entitled ‘an Act to provide for the incorporation of cities and villages,’ approved April 10th, 1872, as amended by subsequent acts.” (Article 12, paragraph 289, page 484 of Cahill’s Illinois Revised Statutes for 1923.)

"Section 7. *The head of the law department of the city shall be the corporation counsel*, and the duties heretofore performed by the city attorney shall be performed by the corporation counsel and his assistants, from and after the adoption of this act the office of city attorney shall be abolished."

Article 1 of Chapter 5 of the Chicago Municipal Code for 1922 contains the following provisions:

"104. Department established.) There is hereby established an executive department of the municipal government of the city which shall be known as the department of law, and which shall embrace the corporation counsel and such number of assistants and clerks as the city council may by ordinance provide; one of such assistants shall be known as the city attorney and another as the prosecuting attorney.

"105. Office created.) There is hereby created the office of corporation counsel. He shall be appointed by the mayor by and with the advice and consent of the city council, *and shall be the head of the law department of the city.*

"108. Duties.) He shall superintend, and with the assistance of the city attorney, prosecuting attorney and his other assistants and clerks, *shall conduct all of the law business of the city.*

"It shall be the duty of the corporation counsel and all other officers of the city if any who shall be given authority to make settlement of lawsuits or controverted claims against the city of Chicago to report in writing, at the first legal meeting of the city council in each and every month, all cases where settlements have been made of such lawsuit or claim."

It will be noted that the aforequoted statute and ordinance make the corporation counsel the "head of the law department of the city" whose duty it is "to conduct all the law business of the city." It remains to determine the legal relationship between these two statutes; whether the pension law being the later statute in point of time impliedly repeals the statute making the corporation counsel the head of the law department to the extent of limiting his duties as law adviser for the Board of Trustees of the Firemen's Pension Fund; or whether the two statutes should be construed to-

gether and both should be given effect. In discussing this question it is first necessary to determine whether the Board of Trustees of the Firemen's Pension Fund is a distinct body politic independent of the city government or whether it is to a certain extent a municipal agency. A very interesting discussion of this question arose in 1891 in the case of *Board of Water Commissioners of the City of Springfield v. the People ex rel, the City of Springfield*, 137 Ill. 660. In that case, the legislature had passed an act incorporating the Springfield Water Works Company. It created certain persons therein named and their successors in office *a body politic and corporate by the name and style of the Board of Water Commissioners of the City of Springfield*, with certain designated powers and with the right of perpetual succession. The City of Springfield itself existed at that time by virtue of a number of acts appearing in the private laws of Illinois for the years between 1854 and 1869. All of these acts in relation to the City of Springfield purported by title to be an amendment to the city charter but the City of Springfield Water Works Act did not purport to be an amendment to the said charter. But the court said, at page 667:

“The act was, in substance and in fact and in legal effect an addition to the charter of the City of Springfield, and invested the city with new and additional powers. It created a board of water commissioners as a department of the municipal government of the city. The whole scope and intent of the act indicated that this board was but a part and parcel of the city government. The mere fact that the legislature saw fit, for the purposes of convenience or administration, to give it corporate existence and invest it with certain corporate powers did not prevent it from being simply a branch or agency, created for a special purpose of the municipal government. Without the active co-operation of the city council it would have been wholly unable to effect the objects of its creation.”

In the case of the *People ex rel. Jacobs v. Coffin*, 282 Ill. 599, the court, in holding that the civil service commissioners of the city and officers under them are a branch of the municipal government noted with approval the principle

laid down in the aforequoted case. The court said at page 609:

“Had the statute expressly made them (the civil service commissioners) a corporate body, to give them corporate existence and invested them with their powers and duties under the civil service law, that alone would not prevent them from being a part of the municipal government. Under the law which created them the commissioners would be wholly unable to effect the objects of their creation without the active co-operation of the city council. They are therefore a branch or agency of the municipal government. *Board of Water Commissioners v. People*, 137 Ill. 660.”

It seems then that the Supreme Court of Illinois has adopted the principle that when a body is incorporated for a public purpose, if its operation depends upon the co-operation of the city council of a city, and if in fact the purpose of its creation could not be carried out without the aid and assistance of the city government, then it is in law a municipal agency and a branch of the city government even though the act of its incorporation makes it a body politic and corporate. Since it is provided in the pension law of 1917 that the *city council* shall annually levy a tax for the purpose of providing revenue for the pension fund it is obvious that the co-operation of the city council of the City of Chicago is necessary in order that the Board of Trustees of the Firemen's Pension Fund can function and effectively carry out the objects of its creation. Therefore, it is concluded that the said Board of Trustees constitutes in law a municipal agency and a branch of the city government notwithstanding the fact that the statute makes it a body politic and corporate.

In view of this conception that the said Board of Trustees is to be considered in law a branch of the city government it may clearly be seen that the law business and litigation conducted by the said Board is necessarily a part of the law business of the city, and therefore according to the act of the legislature and ordinances of the City of Chicago aforequoted should be conducted and supervised by the corporation counsel of the City of Chicago. The only remaining ques-

tion which might arise would be whether the provision of Section 5 (f) in the pension law of 1917 which provides that the said Board may employ counsel or attorney impliedly repeals the statute making the corporation counsel the head of the law department of the city to the extent of making the attorney employed by the Board of Trustees independent of the corporation counsel. It is true that the pension law of 1917 was passed later in point of time than the statute of 1905 which made the corporation counsel the head of the city's law department. But notwithstanding that fact, the repeal of a statute by implication is never favored in law and, whenever possible, two statutes passed upon the same subject will be construed in such a way as to give both force and effect,—especially if it appears that it was the legislative intent that both should be given effect. In the case of the *People v. Wallace*, 291 Ill. 465, the court, at page 470, said:

“Statutes which relate to the same thing or to the same subject or object are *in pari materia* although they were enacted at different times. It is a fundamental rule of statutory construction that not only should the intention of the law makers be deduced from a view of the whole statute and of its every material part, but statutes *in pari materia* should be construed together.”

It is patent that the section of the pension law of 1917 permitting the Board of Trustees to employ an attorney and the statute of 1905 which makes the corporation counsel the head of the law department of the city both relate to the same subject-matter in that the attorney for the Board of Trustees is conducting a part of the law business of the city. Since the two statutes are not repugnant or inconsistent in anywise and since it is possible that the two may be given effect jointly, they should both be given effect. The Board of Trustees of the Firemen's Pension Fund, have the power to employ an attorney or counsel, but such attorney or counsel must be under the immediate control of the corporation counsel and if he does not comply with the orders of the corporation counsel he may be discharged by the corporation counsel, because were this not so the corporation counsel

would be powerless to make the attorney accede to his guidance in the conduct of the law business of the city.

In order to ascertain the intent of the legislature and public policy as interpreted by the Supreme Court of Illinois throughout a long succession of years in holding that all such boards are in law municipal agencies, it is of benefit to examine some of the analogous situations which have arisen. In the case of *Brenan v. the People*, 176 Ill. 620, it was held that the Chicago Board of Education was a municipal agency, the court, on page 628, saying:

“There is, of course, a broad distinction between this and the two cases cited but they are pertinent as showing that merely because a board is invested with certain corporate powers it is not necessarily separated from the municipal government * * *. And we are of the opinion that, even though the effect of the school legislation is to confer corporate powers on the Board of Education or to make it a state agency for certain purposes, still the change has not been such as to disconnect it from the city government and to authorize the courts to declare that the offices and places of employment under the board are no longer offices or places of employment in or of such city.”

In the case *Johnston v. City of Chicago*, 258 Ill. 494, it was held that the Chicago Public Library is a part and parcel of the city government, the court, at page 496, saying:

“Under the statute authorizing the establishing and maintenance of a public library and reading room and the directors of said library were appointed, and may be removed for cause, by the mayor with the approval of the city counsel. Reading the entire statute together, we think its whole scope and intent is that the Library Board is but a part and parcel of the city government. As was said by this court in *Board of Water Commissioners v. People*, 137 Ill. 660, on page 667, ‘without the active co-operation of the city council it would have been wholly unable to effect the objects of its creation.’ And it was there held that the Board of Water Commissioners of the City of Springfield was merely a branch of the municipal government.”

In the case of *Fergus v. Russell*, 270 Ill. 304, it was held that the attorney general is the chief law officer of the state and is the sole official adviser of the executive officers and of all boards, commissions and departments of the state government and that it is his duty to conduct all of the law business of the state both in and out of the courts.

In the very recent case of the *People ex rel., Ettelson v. Faherty*, 306 Ill. 119, it was held that the corporation counsel is the head of the law department of the city with power to appoint all assistants and to superintend and conduct all of the law business of the city and that this duty included the power to conduct the law business of a municipal agency such as the Board of Local Improvements.

In view therefore of the foregoing principles of law and in view of the fact that it has continuously been the policy of the Supreme Court of Illinois to promote efficient city government by giving full and untrammelled effect to the policy of centralizing the conduct of the law business of the municipality or state, as the case may be, under one head, we are of the opinion that, while the Board of Trustees of the Firemen's Pension Fund has the power to employ counsel or attorney and fix the rate of employment, nevertheless said counsel or attorney is subject to the direct supervision of the corporation counsel. For all practical purposes and in effect the counsel of the Board of Trustees of the Firemen's Pension Fund is an assistant corporation counsel with the specific duties of conducting the law business of the Board of Trustees of the Firemen's Pension Fund under the direction and control of the corporation counsel.

Section 5 (a) of the Pension Law of 1917, which provides that the board shall have power "to hear and determine all applications for pensions and to suspend the payment of pensions under this act and its decisions in such matters shall be final and conclusive and not subject to review or reversal, except by the Board," has been construed in the dissenting opinion of Mr. Justice Thomson in the case of *Wilke v. City*, 212 Ill. App. 414, at page 421. The opinion reads:

“Under this provision it becomes the duty of the board of trustees to ‘hear and decide’ a petition for a pension, whenever one may be presented, but under the law the board is left to its discretion as to how it shall decide any application for a pension. Under the finding of fact made by the trial court as quoted above, it would have been proper to enter an order directing that a writ of mandamus issue commanding the board of trustees to ‘hear and decide’ the case in question, but it was error, in my judgment, to direct that a writ of mandamus issue commanding said board to decide the case as specified in the court’s order. In *People v. State Board of Dental Examiners*, 110 Ill. 180, our Supreme Court said: ‘A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment. * * * Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and though it can be compelled by mandamus to determine the fact, it cannot be directed to decide it in a particular way, however clearly it be made to appear what the decision ought to be.’ The following decisions are to the same effect: *McCann v. Harris*, 114 Ill. App. 308; *County of St. Clair v. People*, 85 Ill. 396, 401; *People v. City of Chicago*, 234 Ill. 416, 421; *People v. Henry*, 236 Ill. 124, 127; *People v. Webb*, 256 Ill. 364, 373.”

The decision of the Board of Trustees of the Firemen’s Pension Fund when determining a question of fact is final and may not be reviewed by the courts. But the question of whether the said board has exceeded its jurisdiction or whether it has acted unlawfully upon a given finding of fact is a question which may be reviewed by the courts. So long as the commission is occupied in determining a question of fact on hearing of an application for a pension, it is not subject to the control or direction of the corporation counsel or of anyone else. But when a proceeding is begun in court to mandamus the Board of Trustees or when any other proceeding is begun in court and the Board of Trustees are made a party the conduct of the case in court is under the control and guidance of the corporation counsel and it lies within his discretion to finally determine the proper conduct of such a case and to pass upon such legal questions and

questions of policy as involve the taking of appeals, the settlement of a case and the conducting of the case in the Appellate or Supreme Court.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**De Jure Employe May Recover From City Salary Paid
to a De Facto Employe When Payment Was Not
in Good Faith and Was Fraudulent.**

December 21, 1923.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

The office of the Corporation Counsel is in receipt of your letter of recent date in which you inquire as to the liability of the City of Chicago with respect to the submitted claim of Joseph C. McDonald for the sum of One Thousand Two Hundred Forty Dollars and Thirty-five Cents (\$1,240.35). We have investigated the facts upon which this claim is based and herewith submit to you the result of our investigation and our conclusions of the law thereon.

For sometime prior to March 5, 1916, the said Joseph C. McDonald served as Principal Special Assessment Clerk in the Board of Local Improvements at a salary of Two Thousand Five Hundred Eighty Dollars (\$2,580.00) per year. McDonald had been duly certified to this position by the Civil Service Commission. During the interval between March 5, 1916, to October 7, 1918, McDonald was absent from his position on leave properly obtained from the Civil Service Commissioners. On October 7, 1918, McDonald returned to his position in the Civil Service and was reinstated to the

position of Special Assessment Clerk (senior grade) the position of Principal Special Assessment Clerk which he had formerly held being at that time filled by another person.

It appears from information obtained from the records of the Civil Service Commission that McDonald's place was duly filled by proper certification during his absence, but that it became vacant after his return to the service by the resignation of William J. Hartney on May 29, 1919. Instead of reinstating McDonald to his former position upon Hartney's resignation, as the rules of the Civil Service Commission provide, he was required to give way to one Frank O'Donnell, a sixty day appointee who held the position until May 12, 1920.

O'Donnell was succeeded by James Brinn, and he in turn by Guy McGhee, who each served a short time as a sixty day appointee

On January 1, 1921, upon the death of McGhee, McDonald was finally installed in his former position as Principal Special Assessment Clerk.

Section 4 of Rule VIII of the Civil Service Commission provides as follows

"Upon the expiration of a leave of absence, an officer or employee shall report to the head of his department and be reinstated in his position, unless the position in the meantime has been filled by certification from an eligible register, then he shall be reinstated only when a vacancy in a position of the same branch, class, grade or rank and character of work and approximate salary exists, and in order of seniority of certification."

This rule made it obligatory upon the Civil Service Commission to place McDonald in his former position when it became vacant upon O'Donnell's leaving the service. This, however, was not done, as appears from the foregoing facts.

According to Mr. Frank D. Gleeson, Chief Accountant, Board of Local Improvements, McDonald, although certified as Special Assessment Clerk (senior grade), was actually performing work of Principal Special Assessment Clerk from

the time of his reinstatement on October 7, 1918, until January 1, 1921, when he was restored to his former grade. It is evident that McDonald was required to perform the actual work of the higher position while a sixty day appointee drew the salary.

The Supreme Court has held that if a person has been wrongfully prevented from performing the duties of his office he may recover his salary by an action at law for the time during which he was so prevented, where it has not been paid to any one performing the duties of the office. *Bullis v. City of Chicago*, 235 Ill. 472. *People of the State of Illinois ex rel., Clarence Blachy v. Coffin*, 279 Ill. 401.

In the latter case, the petitioner was wrongfully dismissed from the position of Superintendent of the Bureau of Social Surveys. Another person was appointed to the position to perform the duties, and was paid the salary pertaining to the position. The court affirmed the action of the lower court in awarding a writ of mandamus, and held that the petitioner was entitled to his salary for the time he was excluded from his position.

The records of the Civil Service Commission and the information obtained from the office of the Board of Local Improvements indicate that McDonald was required to perform the work of Principal Special Assessment Clerk while holding a position in a lower grade, while some temporary appointee with no right to the office was permitted to draw the salary. The facts indicate a fraud against the rights of McDonald.

I am of the opinion that McDonald should be compensated for the difference in salary of Principal Special Assessment Clerk and the amount he actually received during the period between May 29, 1919 and January 1, 1921.

Yours very truly,

FRANK M. PADDEN,

Approved:

First Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

What Constitutes the "Front Street Line" of a Building Under the Zoning Ordinance.

December 21, 1923.

H. T. FROST, Esq., Secretary, Board of Appeals.

Dear Sir:

I beg to acknowledge receipt of your letter of December 10th asking the advice of this department in the matter of case No. 223-23-A, which involves the establishment of the front and also the side line of a lot at the Southeast Corner of Washington boulevard and Central avenue.

Because of the importance of the question involved, I have thought it preferable in securing all possible light to confer with the attorneys for the interested parties on both sides and this accounts for the delay in answering your communication.

You state in your letter that the proposed apartment building at said location conforms in every way to the zoning ordinance as to use and volume, and the sole question to be decided is as to the building line.

It appears that the owners of said property desire to place the front line of the apartment building on Washington boulevard and the side line of said building on Central avenue, observing the building line prescribed by the ordinance on Washington boulevard and observing the provision of the ordinance applicable to the side line of building on Central avenue.

It appears further that there are no restrictions in the deeds regarding the building lines on either street, so that any restrictions applying have their basis in the provisions of the zoning ordinance.

The property in question on which it is proposed to erect said apartment building is 200 feet by 177 feet, and is a lot

within the definition recited in the ordinance, which is as follows:

“(m) *Lot*—A parcel of land or premises occupied, or which it is contemplated shall be occupied, by one building with its usual auxiliary buildings or uses customarily incident to it, including such open spaces as are required by this ordinance and such open spaces as are arranged and designed to be used in connection with such building, shall be deemed a lot for the purposes of this ordinance.”

The first question that presents itself is, what is the front street line? The ordinance itself answers the question in the following definition:

“(q) *Street Line*—The street line is the dividing line between a street and the lot. The front street line shall be deemed to be the shortest street line.”

The Supreme Court (8 Ill. 382) has held that the declaration that they shall be “deemed and considered” is as unequivocal an expression as if the language used had said “are hereby declared to be.”

According to the terms of the ordinance, the shortest street line, being the 177 feet fronting on Washington boulevard, would be the front street line.

Section 22, Paragraph B, provides as follows:

“(b) In a Residence district no building shall be erected whose street wall is nearer the front street line than a distance equal to 15 per cent of the average depth of the lots in a block except as hereinafter provided. In an Apartment district no building shall be erected whose street wall is nearer to the front street line than a distance equal to 10 per cent of the average depth of the lots in a block except as hereinafter provided.”

Under this section manifestly it would be necessary for the proposed building to set back from the front street line on Washington boulevard, the distance required by the section just quoted.

And the side line of the proposed building would be governed by the following section of the ordinance:

“(e) Along the side of a corner lot in a Residence district or Apartment district which is not known as the front line and which generally is the side having the greatest dimension along a street line and which side line is in the same block with a lot or lots whose street line is the front line, no building shall be erected whose street wall is nearer the street at the rear end of such side line than the established building line in the block and for each 1 foot that the building or part thereof is distant from the adjoining lot line exclusive of the width of an intervening alley, if any, such building or such part thereof may be erected 1 foot nearer to the street line. The provisions of this paragraph shall apply to a Commercial district which is also in a 1st or 2nd Volume district and which is in the same block with a Residence district or Apartment district.”

Those who oppose the placing of the front line of said building on Washington boulevard and the side line of said building on Central avenue place great stress upon the fact that the parcel of land under discussion extending 200 feet along Central avenue and 177 feet along Washington boulevard was originally platted as eight lots fronting on Central avenue. In my judgment there is nothing in this point. No authority has been cited in support of it and I can find none. Manifestly the zoning ordinance itself does not support such a claim.

The law gives an owner of land the right to divide it or to subdivide it as he sees fit. It is too well known to need discussion that the platting of land is done for convenience of description in buying, selling, recording, transferring, etc., but it is not of importance to an owner in regard to the position on the land in which he will place his building, there being nothing in the deeds or in the plats to the contrary or in the law.

In the case under discussion, manifestly the owner of corner property cannot be compelled to set back his building on two streets and the ordinance requires no such compliance on the part of an owner of corner property.

According to the terms of the zoning ordinance the shortest line of this property is on Washington boulevard

and as the ordinance states that "shall be deemed to be" the front street line.

Owners of property cannot be subject to any provisions except those contained in the laws, there being nothing in the deeds or in the plats concerning building lines in regard to this property. It might well be that the owners of the adjoining property on Central avenue would prefer that the proposed building set back on Central avenue, but these considerations must give way to the right of an owner of property to build upon same as he sees fit so long as he complies with the requirements of the law.

In my opinion the owners of the property under discussion are within their legal rights in calling the Washington boulevard frontage of their property the front line of the building which they propose to erect on said premises.

Very truly yours,

WM. L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Computation of Pension Rights of Municipal Employee
Who is Placed on the Pension Roll and Then
Returns to City Employment.**

December 26, 1923.

MR. WM. E. CASSIDY, Clerk, Municipal Employees' Annuity
and Benefit Fund.

Dear Sir:

We are in receipt of your letter of December 10th asking for an opinion as to the status of James Brady who was formerly General Foreman of Repairs of the Board of Edu-

cation and who returned to the service July 1, 1923, for a short period of time after having been a pensioner previous to the Act of 1921 as amended in 1923.

You ask in your letter whether Mr. Brady is governed by sections 35 and 36 or sections 52 and 52½. The facts indicate that Mr. Brady is covered by sections 35 and 36. Section 35 provides that where a pensioner re-enters the service the annuity or pension theretofore granted shall be suspended while such an employee is in the service and shall be resumed when he again leaves the service. This section must be read in connection with the one that follows it.

Section 36 provides that a pensioner on re-entering the service before the age of sixty-five shall have no right to prior service annuity but that deductions from salary and contribution from the City shall be made in the usual way and upon his retirement he shall receive an annuity based upon the sum to his credit at that time. This sum is to be added to his former pension. This section provides also that no part of the sum to the credit of the employee for age and service annuity purposes which shall have resulted from *contributions by the City* shall be used to provide any amount of annuity in excess of the difference between the amount of his original pension and the amount to which he would have had a right if deduction from his salary and contributions by the City had been made during the entire term of service prior to his attainment of age sixty-five. In other words the law does not permit any money contributed by the City to be used to provide a larger annuity or pension for a pensioner re-entering the service than would have been given to him if he had been a present employee under the Act of 1921 with the same years of service to his credit.

Yours very truly,

FRANK M. PADDEN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Liability of Southern Surety Co. on the Bond of Age
Zylstra, City Collector, for Default of
A Principal Clerk.**

Chicago, December 27, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Replying to your letter of the 21st Instant, we beg to advise you that we consider the Southern Surety Company in default on the bond of Age Zylstra, former City Collector, and that suit is now pending on account of moneys due under said official bond.

The Southern Surety Company was the surety on the official bond of Wolff, the defaulting cashier in the City Collector's office, and also on the bond of the City Collector himself. Wolff's defalcations are far in excess of the amount of his bond. This has never been made good by the surety, nor has there been any offer to settle so far as we know. It may be that surety on this bond is only liable as in the case of other fidelity bonds. It is not important, in any event, to consider the question, because the defalcation has been established, and we do not believe there is any question as to the amount of the liability thereon.

In case the surety company desires to settle the liability on the Wolff bond it can do so, provided it is understood that this is not to be construed as a release or waiver under the Zylstra bond.

With regard to the City Collector's bond, the Southern Surety Company stands in the position of an insurer, as we interpret the law. The honesty of the principal cuts no figure. Due demand was made for payment, and when no payment was made within a reasonable time suit was started. We have never learned from the representatives of this com-

pany under what theory they assumed that the surety is not liable on this bond.

We only pass on the form of bonds, the selection of sureties and the approval of the sufficiency of same being vested with in other officers. We understand, however, that the Comptroller does not make a practice of approving the bonds of any surety company that is in default.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

(Editor's Note: See the case of *City of Chicago v. Southern Surety Co.*, App. Ct. No. 30254.)

Decision of Supreme Court with Regard to Payment of Salaries of Bailiffs.

December 27, 1923.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

In reply to your letter of recent date concerning the decision of the Supreme Court in the case of *People ex rel., Egan v. City of Chicago*, we submit the following:

The case in question was brought for the purpose of compelling the City Council to make an appropriation for bailiffs in addition to those provided for by the annual appropriation bill, the contention being that under Section 17 of the Municipal Court Act, the judges of the Municipal

Court had the right to determine the number of bailiffs and fix their salaries.

Judge David, of the Superior Court, ruled that the writ of mandamus should issue in conformity with the petition.

The Supreme Court sustained the City in its contention that the writ of mandamus does not lie, reversed Judge David, and held that the City's demurrer to the petition should have been sustained.

There were four principal points raised by the City: first, that the Municipal Court had no right to fix the number of bailiffs and their salaries; second, that to do so was amending a number of sections of the Cities and Villages Act; third, that the section of the Municipal Court Act under which the proceeding was instituted was not in effect because there had been no referendum; and finally, that in order to sustain a writ of mandamus a demand had to be made between the time of passage of the appropriation bill and the next regular meeting, as otherwise there could be no additional appropriation for salaries made during the year.

The Supreme Court held against us on the first two points, decided in our favor on the third point, and ignored the last point, probably reserving its decision because it was not necessary to pass on this point in this case.

The gist of the court's decision is that the incurring of the obligation by the Municipal Court is not in violation of the Constitution because that feature of the Act was properly adopted, and thereby the people had constituted the court as the proper corporate authority to impose such an obligation; that there was no invasion of the constitution even if parts of the Cities and Villages Act have been amended, because the Municipal Court Act deals comprehensively with the subject matter and could treat this subject matter without reference to other acts; but it held that Section 17 of the Act as now on the books is not in force, and that the petition for mandamus was therefore based on a sec-

tion of the Municipal Court Act which was void because it had been amended without a referendum. We understand that the parties affected will apply for re-hearing but there is not much likelihood of a change in the decision.

The effect of the decision is that the assistant chief deputy bailiff has his salary reduced from \$3,000 to \$2,500, and the other deputies are all reduced to \$1,500, these being the maximum amounts permitted under the statutes. The ruling holds also as to deputy clerks, so that the salaries of only four additional deputy clerks other than the chief deputy and those employed as shorthand reporters, can be above \$1,800 per annum.

Neither the clerk nor bailiff appear to be affected by the decision, because the Act provides that their salaries are to be fixed by the City Council, and the naming of the salary in the appropriation bill will probably be construed as a fixing of the salary by the City Council. The decision, however, affects several hundred men in their employ.

The present status of the law is that the judges of the Municipal Court may determine the number of such employes. They may also fix their salaries, provided such salaries do not exceed in each case the maximum prescribed by law, which is as above stated.

With respect to salaries for the coming year, they will have to be kept within the statute unless the amendatory Acts changing the sections in question are submitted to a referendum and adopted. In our opinion this can be done, even though no referendum provision was attached to them by the Legislature. If it should be decided that these will be so submitted at the April primary, the appropriations can be so made that a part of the salary of each deputy clerk or deputy bailiff affected will be paid only in case the amendments are adopted.

Since salaries paid to the clerk and bailiff in the past do not appear to be affected, there is no occasion for commenting on the over-payment of deputy clerks and deputy bailiffs.

Such over-payment in the case of an employe rests on a different basis than the over-payment of an officer.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

(Editor's Note: See case of *People ex rel. Egan v. City of Chicago*, 310 Ill. 534.)

Right of Widow Whose Husband Died Intestate to Receive Refund of Money Her Husband Paid Into the Pension Fund.

December 28, 1923.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

Replying to your letter of December 27th, relative to the right of Mrs. Josephine Costigan to collect and receive refund of money paid into the pension fund by her son, George P. Costigan, who was killed August 15, 1923, I submit the following opinion:

Chapter 39 of the Statutes of Illinois provides that when a man dies leaving no will, his estate shall be distributed in accordance with the provisions set forth in said chapter, one of which is as follows:

"When there is no child of the intestate, nor descendant of such child, and no widow or surviving hus-

band, then to the parents, brothers and sisters of the deceased and their descendants, in equal parts among them, allowing to each of the parents, if living, a child's part, or to the survivor of them if one be dead, a double portion; and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants."

If George P. Costigan left no will and was never married and never adopted any child or children, then the money paid by him into the pension fund should be returned to his father and mother, sisters and brothers and their descendants, as hereinabove set forth.

I understand that the amount involved is in the neighborhood of \$150.00, and it would be unfortunate if the family was obliged to go into the Probate Court to collect this money. I would, therefore, suggest that all the members of the family sign a written assignment of their interest to the mother, so that a check can be made out in the name of the mother and given to her direct. In this way, the trouble and expense of probate proceedings can be avoided.

I am sending you attached hereto a copy of the form of assignment to be signed by the father and other members of the family, that is, brothers and sisters, together with a form of affidavit which Mrs. Costigan ought to sign to show who are the heirs of George P. Costigan.

As soon as the attached instruments are executed and presented to you, you can have check issued to Mrs. Costigan, and place the assignment and affidavit with the files in your office.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Present Legal Status of Ordinance Reserving a Ten-foot Strip of Land on the West Side of the Chicago River Between Jackson Boulevard and Adams Street.

December 28, 1923.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have requested the Corporation Counsel for an opinion in regard to the present legal status of the 10-foot strip of land located on the west side of the Chicago river, between Jackson boulevard and Adams street, and whether the City has any claim in said strip of land by virtue of an ordinance passed in 1848 reserving a 10-foot strip of land on the then west bank of the Chicago river for wharfing privileges.

In 1847 the legislature of the State of Illinois passed "An Act to adjust and settle the title to the wharfing privileges in Chicago and for other purposes," approved February 27, 1847. Under the aforesaid statute ordinances were passed during the years 1854 and 1855 establishing the 10-foot strip of land next adjoining the river on the west side thereof, including that portion located between Jackson boulevard and Adams street as an open wharf. These ordinances appear in Hoover's Special Ordinances of 1915, pages 21 to 35.

On June 19, 1901, the Sanitary District Trustees of Chicago adopted a plan for the deepening and widening of the Chicago river between Lake street and Robey street in the City of Chicago and on the 20th day of May, 1903, the said trustees passed an ordinance providing for the widening and improving of said river as aforesaid. By the terms of that ordinance the Chicago river was widened by extending the west side thereof and in that particular section of the

river lying between Jackson boulevard and Adams street, the amount of land which was taken from the west side of the river was greater in width than the 10-foot strip hereinbefore referred to. These proceedings were consummated and the decree made final in the case of *Pittsburgh, Ft. Wayne and Chicago Ry. Co. v. The Sanitary District of Chicago*, 218 Ill. 286. The result of the condemnation of land on the west bank of the Chicago river for the purpose of widening the river was that all of that land which was reserved by the wharfing privilege ordinance, above referred to, for docking purposes was cut off.

The wharfing privilege ordinance which requires a 10-foot strip next adjoining the river to remain open and free from buildings, did not definitely refer by legal description to that exact portion of land which should remain open but merely described the 10-foot strip as "10 feet in width next adjoining to the river." But if there were to be placed upon this ordinance the construction that it would mean that after land had been condemned and a new bank established, that thereby a 10-foot easement would automatically be created upon the new bank, there would be a taking of property without due process which is forbidden by the Constitution.

So unless the provision was made in the condemnation proceedings themselves to condemn the 10 feet next adjoining the new river bank, there is no authority in law to maintain that the 10-foot strip of land on the west side of the present bank can be kept open.

An examination of the proceedings and record in the aforesaid case of *Pittsburgh, Ft. Wayne and Chicago Ry. Co. v. The Sanitary District of Chicago* has shown that in that condemnation proceeding, no provision was made for the condemnation of any strip of land along the new west bank of the Chicago river between Jackson boulevard and Adams street. The record in that case does show, however, that the City of Chicago filed a cross-petition for the purpose of setting up its entire interest in all the land which

could be affected by that proceeding. The following are the claims which were set up by the City of Chicago in its said cross-petition:

“The City of Chicago alleges that it is the owner in fee simple as trustee for the use of the schools of:

All of Monroe street between the East line of Canal street and the center thread of the South branch of the Chicago river.

All that part of Adams street lying between the East line of Canal street and the center thread of the South branch of the Chicago river.

All that part of Jackson street lying between the East line of Canal street and the center thread of the South branch of the Chicago river.

All those tracts of land adjacent to Block 69 and Block 70 in the School Trustees Subdivision of Section 16, in the City of Chicago lying between the center thread of the South branch of the Chicago river and the dock line established in 1857 on the West side of said South branch of the Chicago river.

All that tract of land heretofore conveyed to the City of Chicago by the Pittsburg, Ft. Wayne and Chicago Railway Company by deed dated December 9, 1885, and recorded in the Recorder's Office of Cook County, Illinois, as Document No. 697710.”

It will be noted that the above quoted cross-petition of the City of Chicago which purports to set up all of the City's claim in the land about to be condemned, does not set forth or claim any interest in the 10-foot strip of land which the above mentioned ordinances of 1853 and 1854 required to be kept open. The transcript of record in the condemnation proceedings also shows that the verdict included the claims of the cross-petitioner. Since the City of Chicago did not set up its interest in the 10-foot strip of land as aforesaid, it is now unable to assert any interest in that strip of land. Since the condemnation proceedings did not condemn a new strip of land on the new west bank of the river to remain open, there is no valid law in force requiring that the 10-foot strip of land on the new and present west bank of the Chicago river between Jackson boulevard and Adams street be kept open.

Our conclusion, therefore, is that the City of Chicago has not the right to require that a strip of land of any width be kept open on the west bank of the Chicago river between Jackson boulevard and Adams street, and that if the Union Station Company desire to construct their station in such a way as to prevent egress over the said portion of the west bank of the Chicago river, the City of Chicago has not the legal right to prevent it.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Sunday Closing Ordinance for Barber Shops.

December 28, 1923.

HON. JACOB M. ARVEY, Alderman, 24th Ward.

Dear Sir:

In reply to your request for an opinion from this department as to the constitutionality of a Sunday closing ordinance for barber shops, draft of which was submitted by you, we beg to advise that such an ordinance could not be sustained under the decision in the case of *Eden v. People of the State of Illinois*, 161 Ill. 296.

In that case the defendant was convicted for the violation of a state statute which provided that no barber shop should keep open or do business on Sunday. The Supreme Court reversed the decision, and on page 309 says:

“We do not, therefore, think the law was authorized by the police power of the State. If the public welfare of the State demands that all business and all labor

of every description, except works of necessity and charity, should cease on Sunday, the first day of the week, and that day should be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings on that day. (Cooley's Const. Lim. 725.) All will then be placed on a perfect equality, and no one can complain of an unjust discrimination. But when the legislature undertakes to single out one class of labor harmless in itself, and condemn that and that alone, it transcends its legitimate powers, and its action cannot be sustained."

A municipal ordinance imposing the same restriction as the statute there declared invalid stands no chance of being sustained in the face of the *Eden* decision.

We are about to submit to the City Council draft of an ordinance repealing the entire ordinance regulating the licensing of barber shops, which ordinance we consider unconstitutional.

Yours very truly,

RUTH C. NELSON,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Application of Landlord for Permit to Install Tanks
for Filling Station upon Frontage Consents
Procured by Tenant a Year and One-half
Ago and After Tenant Has Aban-
doned Use of Tank for
Some Time.**

Chicago, December 29, 1923.

JOHN C. McDONNELL, Esq., Chief, Bureau of Fire Prevention and Public Safety.

Dear Sir:

Your letter of recent date concerning the application for a permit to install a gasoline tank on the premises at 1400-

1404 West 55th street was referred to the undersigned for consideration and reply.

It appears from your letter and a communication from Worth E. Caylor, attached thereto, that on July 7, 1922, one Clarence D. Nielson, who is the tenant in possession of said premises with a lease that does not expire until some time in 1928, made application for a permit to install a thousand gallon tank for the purpose of using the premises for a public gasoline filling station. Frontage consents were filed with the application, showing the necessary consent had been obtained, and the permit to install the tank was issued. For some reason or other—not important in this connection—there never was any final approval for the conducting of a filling station, but such a filling station was conducted by Nielson, without a license, on the premises up to a short time ago. The tank was then removed, and Nielson continues to use the premises as a repair shop. At the time the lease was made, in 1922, the premises were owned by a Mrs. Burnett. In November, 1923, the premises were sold to Mrs. Carrie M. Garlick. On December 20, 1923, application was made by Mrs. Garlick for a permit to install a new tank.

Your inquiry is directed to the question whether the present owner of the land has any right to demand a permit under and by virtue of frontage consents given to the tenant a year and a half ago. The theory of the attorney representing the owner is that in some way the consent of the surrounding property owners attaches to the land and that the tenant cannot divest the land of this right or privilege. It is admitted that the tenant does not at this time intend to use the tank or to operate a filling station on the premises, and the securing of the permit is for the purpose of preserving the right to install the tank at such time as the lease may expire.

We are of the opinion that no right attaches to the landlord to avail himself of the frontage consents given to the tenant in such a case, especially where there is clear abandonment of the right by the expiration of the term of the per-

mit, or where there is an abandonment by the removal of the tank so installed, or where the right to conduct the filling station has never been finally granted by the issuance of a license.

There is no such thing as the right of installing a gasoline tank running with the land. The authority of the City to control the location of such tanks is based on the police power. The City's police power is something which the City cannot divest itself of and it cannot be made the subject of barter or exchange. (*City of Chicago v. Chicago Union Traction Company*, 199 Ill. 259.) If the City at any time before the expiration of the lease in question, or thereafter, sees fit to change the requirement it cannot be prevented from doing so merely because a permit has been issued. In fact, it has been decided that a municipal corporation may even require the removal of tanks for the storage of oil, when the welfare of the community justifies such action. (*Standard Oil Co. v. City of Danville*, 199 Ill. 50.) Therefore, under no theory can it be said that the obtaining of frontage consents for the purpose of installing a tank constitutes a right which runs with the land.

Under the City's ordinances, when a party desires to install such a tank he is required to secure and file frontage consents for that purpose. The right to do so is extended to such a person for the particular purpose and at the time it is granted, and not to the owner of the land. Whatever rights the owner of the land acquires arise by virtue of a reversion to him of the premises. Such rights at best are inchoate and cannot be asserted while the tenant is in possession any more than the right of dower can be asserted while the owner is alive.

This department has frequently advised against so extreme an exercise of the police power as to deprive a party of the right to use his property for the purposes for which it was improved. We have gone so far as to say that when a certain use is once legally established in a building the char-

acter of the building for all purposes of future occupancy is stamped and permanently fixed until there is a change in the character of the occupation. (See Opinions of the Corporation Counsel and Assistants, April 1, 1911, to December 31, 1912, p. 809; see also Opinions from July 1, 1916, to December 31, 1919, p. 642.) This, of course, is subject to the limitation that if there is a change in the law the police power is sufficient to overcome the rule.

But such opinions as the ones we speak of were written on the theory that there is a continuous occupation for the same purpose even though there might be a change of ownership. Where there was a gap between the occupancy by one party and a similar occupancy by another party we have always held that the right lapses, and the new party must get new frontage consents if they are required under the law. This has never been lost sight of, and we could point to instances where there have been new buildings constructed on sites on which the businesses were kept going in some way while the construction work was in progress, in order that the right might not be lost.

In the present instance, the proposed tank or filling station is located within a district which has been zoned for residential purposes as an apartment house district. Therefore such use would be a non-conforming use. In addition to all that has been said above, we call attention to Section 14 of the Zoning Ordinance, under which we believe the right has already lapsed.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Letting of Contracts by City Comptroller for Advertisement of Matters Required by Law to be Published.

December 29, 1923.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You have asked my opinion on the proper course to be pursued in the matter of bids for the advertisement of those matters and things required by law or ordinance to be published in the City newspapers for the year 1924 (as per printed copies of advertisement attached).

Chapter LV of the Municipal Code, Sections 2835, 2836, 2837, 2839 and 2840 cover this matter. For your convenience I am quoting these sections here:

Section 2835. ANNUAL CONTRACT FOR PUBLICATION. The city comptroller shall annually on the first Monday of December advertise in such daily newspaper or newspapers published in the city as he may select, inviting proposals for the following contract:

For the publication in any English newspaper, being published at least six times a week, of those matters and things required by law or any ordinance of the city to be published in a newspaper.

Section 2836. LETTING CONTRACT—BIDS—HOW MADE. Such advertisement shall be published for ten consecutive days; and such contract shall be let to the lowest reliable and responsible bidder. All bids shall be sealed and directed to and deposited with the comptroller within twenty days after the date of the first publication of such advertisement.

Section 2837. AWARD OF CONTRACT. Such bids shall be opened at the hour and place mentioned in such advertisement, by the comptroller in the presence of the mayor and the chairman of the committee on finance, who shall constitute a board for such purpose, and it shall then and there be ascertained and determined by the

majority of said board who is, if any one, the lowest reliable and responsible bidder for such contract.

* * * * *

Section 2839. CIRCULATION CONSIDERED. LIMITATION. In determining who is the lowest reliable and responsible bidder for such contract, said board may take into consideration the circulation of the bidder's newspaper within the limits of the city; provided, however, that no advertisement for any city printing whatsoever shall be given or let to any newspaper in the city which in its columns has taught, or teaches, advocates or abets any measures, or any people, who have for their object the overthrow, by force or illegal means, of the laws of the government, the state or the city.

Section 2940. APPROVAL OF BIDS—LETTING CONTRACT. All bids received by the comptroller, and the action of said board thereon, shall be reported by said comptroller to the city council for its approval; and when approved by that body, such contract shall be let by said comptroller to the person to whom it was awarded by said board, for the period of one year and no longer.

* * * * *

You will notice that Section 2839 gives the "Board" (consisting of the Comptroller, in the presence of the Mayor and the Chairman of the Finance Committee) the right to take into consideration in determining who is the lowest reliable and responsible bidder the circulation of the newspaper within the limits of the City. I think under this section it would also be appropriate for the Board to consider the character of the circulation of the bidders—whether confined to a particular trade or calling, whether local to one part of the city, or of general circulation, etc.

Under Section 2840 the City Council must finally determine to whom the contract should be awarded, and their action in the matter is final.

Specifically, I think you would be entirely within your rights to award this contract to the Chicago Evening Post in preference to the Calumet Publishing Company, because of the relative circulations of the bidders and the character of the circulation, the Daily Calumet being practically limited to South Chicago and the Chicago Evening Post being a

paper of general circulation throughout Chicago. Should you decide to do this, however, I would advise that in your communication to the City Council recommending the acceptance of the Chicago Evening Post bid specific attention be called to the fact that that bid is slightly higher than the bid of the Calumet Publishing Co., and your recommendation, if made, is based upon the difference in the size and character of the circulation.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Invalidity of Contract to Sign Frontage Consent Petition—Right of Signer to Withdraw Before Issuance of Permit.

December 31, 1923.

HON. DONALD S. MCKINLEY, Alderman, 19th Ward.

Dear Alderman:

We are in receipt of your communication of the 24th instant, with reference to the question of sufficiency of signatures as required by law, on a petition in behalf of John McMahon for the moving of his house from 8845 Laflin street to 8521 Laflin street.

You submit a petition containing not quite the required two-thirds frontage consents, but appended to such petition is an agreement entered into between John and Mary McMahon and Wm. C. Brinkerhoff, which if considered binding by this department, would be adequate for the purpose intended.

The signing of a frontage consent petition, of necessity, must be a purely voluntary act. The moment consideration passes for the procurement of any signature to such petition,

the courts will refuse to countenance the valid existence of such signature.

While in this particular case the agreement which provides for improvements to be made certain, as a consideration moving to Wm. C. Brinkerhoff and could not possibly be construed as a special consideration, but rather a consideration inuring to all the neighbors who signed the petition, yet, it has been held time and again by our courts that until the permit has actually issued, the signers can withdraw their names, as such voluntary acts on their part were not irrevocable.

It is quite apparent in this case that Wm. Brinkerhoff could have signed his name to the petition at the same time he signed this agreement which was intended to insure the protection of property rights of adjoining owners. But for some reason or other, it was not done. Does this not then plainly show that Mr. Brinkerhoff's intention was not entirely clear to himself and justified his doubt by refusing to sign the petition later on when it was necessary to validate the petition?

We feel he is within his rights not to sign this petition, the agreement to the contrary notwithstanding and that were we to hold that his signature under seal to this agreement could be considered as his having constructively signed the petition, it could still be possible for him to revoke his own act before permit issues, which he now has done by implication.

We are therefore of the opinion that the department cannot consider the petition as being valid until further signatures are appended.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Participation in Distribution of Grommes & Ullrich
Liquor Stock by Policemen—Violation of
Prohibition Act—Facts in Mitiga-
tion of Penalty.**

January 2, 1924.

HON. NICHOLAS R. FINN, EDWARD S. EVANS and JOHN A.
PELKA, Civil Service Commissioners.

Gentlemen :

The Corporation Counsel has received from you the transcript of evidence taken before you on the 7th day of December, 1923, relative to the participation in the distribution of the Grommes & Ullrich liquor stock by Bertram Cleghorn and Michael A. Sheridan. You have requested us to render an opinion for the purpose of ascertaining whether the said Bertram Cleghorn and the said Michael A. Sheridan are guilty as charged.

An inspection of the record shows that Bertram Cleghorn and Michael A. Sheridan have been charged with a violation of Paragraph 7, Rule 30, Section 1 of the Rules and Regulations of the Department of Police, prescribed and in force November 1, 1910. Paragraph 7 provides that a member of the Police Force may be suspended or discharged, in the discretion of the Civil Service, for a "violation of any criminal law." The specifications for the said Bertram Cleghorn are as follows:

"In that the said Lieutenant Bertram Cleghorn of this, the fifteenth district, did participate in the distribution of the Grommes & Ullrich liquor stock in April of this year, in which Lieutenant Cleghorn received sixteen (16) cases of intoxicating liquor from this firm.

The said Lieutenant Bertram Cleghorn participated in an unlawful act and the unlawful possession of liquor in violation of the Prohibition Law and the Volstead Act."

The specifications for Michael A. Sheridan are as follows:

"That said Sergeant Michael A. Sheridan, of the Motor Cycle Section, Department of Police of the City of Chicago, did participate in the distribution of the Grommes & Ullrich liquor stock in April of this year, in which Sergeant Sheridan received twenty-four (24) cases of intoxicating liquor from this firm, consisting of brandy, rum, gin and blackberry cordial, a total of about sixty-nine (69) gallons.

The said Sergeant Sheridan participated in an unlawful act and in an unlawful possession of liquor in violation of the Prohibition Law and the Volstead Act."

An examination of the transcript of the evidence heard before the Civil Service Commission on, to wit: December 5th and 7th, 1923, and an examination of the transcript of evidence heard in the case of *United States of America v. Grommes & Ullrich et al.*, before Judge Evans on, to wit: November 17, 1923, discloses the following uncontroverted facts:

Bertram Cleghorn, formerly a Lieutenant of Police, residing at 6158 South California avenue, had been acquainted with Harry S. Tansey, the President of the Grommes & Ullrich Company, for nine or ten years. In 1920 and 1921, he had loaned Tansey between Five Hundred (\$500) Dollars and Six Hundred (\$600) Dollars. This loan has never been repaid. During the early part of March, 1923, the said Bertram Cleghorn had a conversation with the said Tansey, in which Tansey offered him a certificate of stock in the Grommes & Ullrich Company telling him that this stock certificate would wipe out all past obligations between them. The said Tansey then and there explained to the said Cleghorn that the Grommes & Ullrich Corporation was about to be dissolved and its assets, consisting of its stocks in intoxicating liquors, were to be distributed to the shareholders. It was further represented to the said Cleghorn that this distribution of liquor was a legal and lawful procedure to take place under United States Government supervision and permission. The said Cleghorn thereupon accepted the certificate

of sixteen (16) shares of stock. Subsequently he received at his home ten (10) cases of brandy, three (3) cases of gin, two (2) cases of rum and one (1) case of blackberry cordial. This liquor was delivered by Government Agents and under Government Permit.

The said Michael A. Sheridan is a cousin of the said Harry S. Tansey. He was given a present of twenty-four shares of stock in the Grommes & Ullrich Company under the same explanation and representations as to the legality of the liquor distribution as were made to the said Bertram Cleghorn. There was no consideration for this present of stock. Pursuant to the liquidation of the Grommes & Ullrich Company, the said Sheridan received his proportionate share of intoxicating liquor, amounting to twenty-four (24) cases, delivered to his home by Federal Agents and under Federal Permit. The transcript of evidence taken before Judge Evans also shows that when the delivery was being made by the Federal Agents to the shareholders of the Grommes & Ullrich Company, that Sheridan, who was then on sick leave, followed the truck in the automobile owned and driven by Harry S. Tansey.

There is no controversy in regard to any of the facts above stated. The evidence is clear and is not conflicting. The only question presented, is whether this statement of fact constitutes a violation of a criminal law as charged in the specifications hereinabove quoted.

The Eighteenth Amendment of the United States Constitution, ratified January 29, 1919, is as follows:

“Section 1. After one (1) year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”

“Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.”

“Section 3. This article shall be inoperative unless it shall have been ratified as an Amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven (7) years from the date of the submission hereof to the states by the Congress.”

By virtue of this Amendment both the Congress of the United States and the several States have concurrent power to pass laws for the purpose of enforcing the constitutional prohibition against intoxicating liquors. Pursuant thereto the Congress of the United States has passed a Federal Prohibition Enforcement Act, commonly known as the “Volstead Act,” and the State of Illinois has passed “an Act to restrict the manufacture, possession and use of intoxicating liquor within prohibition territory,” in force July 1, 1919 (commonly known and hereinafter referred to as the “Search and Seizure Act”) and later the State of Illinois passed “an Act to restrict the manufacture, sale, transportation, possession and use of intoxicating liquor, aiding thereby in establishing uniformity in State and Federal laws in regard thereto,” in force July 1, 1921 (commonly known and hereinafter referred to as the Prohibition Act). It may at this point, properly be observed that the “Prohibition Act” and the “Search and Seizure Act” of Illinois, although passed at different times are, nevertheless, both in force, inasmuch as the latter act contains no repealing clause and the two acts are not in conflict.

Due to authority granted by the Eighteenth Amendment of the United States Constitution, both the States and United States have the concurrent power to enforce Prohibition laws. This grant of power cannot lead to a *conflict* in the laws enforcing Prohibition, in that both the State laws and Federal laws must be drafted to accomplish the same purpose, i. e., the purpose of prohibiting the manufacture, sale or transportation of intoxicating liquors for beverage purposes. However, it may well come about that certain acts may be prohibited by the one law and not by the other, so that certain facts may constitute a violation of the Illinois

Prohibition Act," and yet not constitute a violation of the "Volstead Act," and vice versa. It is also true that the general rule laid down in regard to former jeopardy is that when a person has been punished and convicted for a crime under the State law, and if the same state of facts constitutes a crime under the Federal law, such person may be again convicted and punished for the violation of the Federal law. (*Grafton v. United States*, 206 U. S. 333, 27 S. Ct. 749; *United States v. Barnhart*, 22 Fed. 285; *State v. Moore*, 143 Ia. 240; *State v. Rankin*, 4 Cald. (Tenn.) 145; 16 C. J. 282.)

Consequently, although the said Bertram Cleghorn and Michael A. Sheridan were acquitted in the Federal Court of a conspiracy to violate the Federal Prohibition Act, the acquittal of a conspiracy to violate the *Federal* law, is no bar to a prosecution for a violation of the *State* law, even if the State charge were a charge similar to the Federal charge. However, the question of conspiracy does not so strongly appear from the evidence in this proceeding as does the violation of those Sections of the Illinois Prohibition Laws, which will be hereinafter considered.

Section 3 of the Illinois Prohibition Act (Chapter 43, page 1435 of Cahill's Revised Statutes for 1923) is as follows:

"Section 3. No person shall on or after the date when this Act goes into effect, manufacture, sell, barter, transport, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Section 3 of the Search and Seizure Act of Illinois (Chapter 43, page 1449 of Cahill's Revised Statutes for 1923) is as follows:

"Section 3. Whoever shall, within prohibition territory, by himself or another, either as principal, clerk or servant, in any manner manufacture, keep for sale,

order, purchase, receive, transport upon any highway, cause to be transported upon any highway, take an order for, sell, give away, or dispose of, or aid any person in procuring any intoxicating liquor in any quantity whatsoever shall be punished in the manner prescribed in Section Eight (8) of this Act. * * *

It will be noted that the Prohibition Act, among other things, forbids the *possession* of intoxicating liquor except as authorized in the act, and that the "Search and Seizure Act," forbids, among other things, the *receiving* of intoxicating liquor. Both the "Illinois Prohibition Act" and the "Search and Seizure Act" prescribe certain exceptions, when intoxicating liquors may be transported and received; but all of these exceptions relate to the use of liquor for non-beverage purposes or sacramental purposes, or certain authorized commercial purposes. Furthermore, no exception is made for receiving liquor under a federal permit and by virtue of federal authority. And, therefore, in view of the principle of law hereinbefore laid down, it is patent that even should the receiving of liquor for beverage purposes under a federal permit not be a violation of the federal law (but this question is not passed upon in this opinion) nevertheless receiving liquor into one's possession for beverage purposes is a direct violation of the State Prohibition laws.

Although the record in this case shows that both the said Cleghorn and Sheridan have, apparently, acted in good faith, and have believed that they were not violating either the State or Federal law, nevertheless it is a well known maxim that ignorance of the law excuses no one. While the question of good faith may properly be considered when determining the severity of the punishment to be meted out, it cannot be considered in determining the question of whether or not a crime has been committed. The following penalties are prescribed by the Rules and Regulations of the Department of Police of the City of Chicago, in force November 1, 1910:

"a. Reprimand.

b. Fine not exceeding the pay due or to become due for a period of thirty (30) days.

c. Suspension without pay for a term not exceeding thirty (30) days.

Section 2. *Civil Service Commission may discharge member.* The Civil Service Commission upon hearing may discharge any member from the Police Department and the service of the City of Chicago for committing any one or more of said offenses."

The foregoing penalties, then, which may be imposed for the violation of any criminal law are, reprimand, fine, suspension, or expulsion. It is equitable and just that the Civil Service Commission should consider the question of good faith and whether or not the said Cleghorn and Sheridan believed they were violating the law, in determining which of these penalties should be inflicted. If the Commission should feel that the facts do not warrant the discharge of these men, they may leave the imposition of correctional measures to the department head, by reprimand, etc.

In a statutory crime, a criminal intent is not necessary, unless the statute specifically requires that such an intent exist. No such requirement appears in the State Prohibition Laws.

In conclusion, therefore, we are constrained to hold that the uncontroverted facts, as disclosed by the testimony of Bertram Cleghorn and Michael A. Sheridan, show that there has been a violation of the "Illinois Prohibition Act" and of the "Illinois Search and Seizure Act," and that the said Cleghorn and Sheridan are guilty as charged in the specifications.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Effect of 1915 and 1921 Amendments to the Police Pension Law on Pension of Widow Whose Husband Was Receiving Pension Under the 1887 Act.

January 2, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

Replying to your letter of December 28, 1923, relative to what pension law should apply in fixing the pension of Mrs. May Carpenter, widow of John G. Carpenter, a deceased police pensioner, I submit the following:

Your letter states that John G. Carpenter resigned from the Police Department on May 1, 1904, was granted a pension of \$50 per month on May 17, 1904, and died on November 13, 1923, being still in receipt of his pension award at the time of his death.

Section 50 of the Policemen's Annuity and Benefit Fund Act, approved June 29, 1921, provides, among other things, as follows:

“Widows * * * of policemen who are or who shall become pensioners under and by virtue of said Act entitled ‘An Act to provide for setting apart, formation and disbursements of a police pension fund in cities having a population exceeding two hundred thousand inhabitants,’ approved June 29, 1915, in force July 1, 1915, as subsequently amended, and who shall die shall have a right to receive pensions in accord with the provisions of said Act as subsequently amended, and the retirement board shall allow all such pensions in accordance with the provisions of said Act, as subsequently amended, and shall pay all such pensions from the annuity and benefit fund herein provided for.”

Section 12 of the Police Pension Fund Act of 1915, hereinabove referred to, contained the following provision:

“All persons, who, upon the taking effect of this Act, are entitled to or receiving pensions under an Act entitled ‘An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns’ (approved April 29, 1887, in force July 1, 1887), as subsequently amended, shall receive no further payment under said Act, but shall in lieu thereof be entitled to the benefits provided for in this Act, the intention being that in this Act, in cities within its terms, shall supersede the aforesaid Act, but that neither pensions granted thereunder nor the amount thereof shall in anywise be *affected*. No allowance or order of the Board herein established shall be held to create any liability against any such city, except upon the funds so set apart, as aforesaid, for the payment thereof.”

As John G. Carpenter became a pensioner in 1904, he was subject to the provisions of the Act of 1887, as amended, and continued to be a pensioner under the Act of 1915, in accordance with the provisions of Section 12 thereof hereinabove quoted, so that he was a pensioner under and by virtue of the Act of 1915, as amended, at the time the present Annuity and Benefit Fund Act went into force and effect, and was within the class named in Section 50 of the present act hereinabove set out.

The pension to which Mrs. May Carpenter would be entitled would, therefore, under Section 50 of the present act, be allowed or disallowed by the Retirement Board according to the provisions of the Act of 1915, as amended in 1917. In 1917 the Police Pension Fund Act of 1915 was amended to read as follows:

“After the death of any such policeman (i. e., a policeman retired on a pension as provided in the Act) his widow, in case the marriage of such policeman shall have taken place more than one year prior to the time a pension is granted him hereunder, shall receive a pension of \$50.00 per month, and an additional sum of \$10.00 per month for each of his children under eighteen years of age. If any such child ceases attending school between the age of fourteen and eighteen years, the aforesaid sum shall be reduced to \$5.00 per month.”

I am of the opinion that Mrs. May Carpenter should be paid the sum of \$50 per month, with the additional sums for children, if any, as provided in the Act of 1915, as amended in 1917, hereinabove set out. This pension shall cease in case the widow shall remarry.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Payment of Salary to De Jure Judge Holding Office
Under Order of County Court in Election Con-
test Case, From Which Appeal is Pending.**

Chicago, January 2, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your letter of recent date with which you submitted pay-roll covering salary of Judge Philip J. Finnegan for the period extending from October 16, 1923, to December 4, 1923, inclusive. Your letter states that the pay-roll covers the period from October 16th to December 21st, but we assume that is a mistake. Judge Finnegan having been duly sworn in on December 5th, and having served as the *de jure* judge from that time on, there can be no question as to his salary for the period after December 5th.

From the facts that we have before us, we are of the opinion that Judge Finnegan may safely be paid the salary for the period in question.

A final order of court was entered in the election contest involving this office on October 15, 1923. By this order

Judge Finnegan was adjudged the duly elected officer who was entitled to the position. The incumbent, Judge Eller, prayed an appeal to the Supreme Court, and this appeal is still pending. If he had remained in office up to the time that Judge Finnegan obtained his commission there would be ground for holding up the pay-roll until the appeal is finally disposed of; and if he had drawn the salary for the period there would be questions involved which we need not now consider. But he did not retain the office, and, so far as we know, has made no claim for salary after October 15, 1923.

By virtue of receiving his commission since the rendering of the decree the gap between the adjudication of Judge Finnegan's rights and the receipt of his commission is closed up, and he must be regarded as the *de jure* officer from the date of the decree. The well known cases of *Behrensmeyer v. Kreitz*, 135 Ill. 591, and *Kreitz v. Behrensmeyer*, 149 Ill. 496, are authority for this position, and in addition thereto, it was held as early as *Mayfield v. Moore*, 53 Ill. 431, that the right to recover the salary does not depend on the possession of the commission but on the judgment of the court which settles the right to the office.

We therefore believe that you may regard the possibility of the reversal of the final order of the County Court affecting the question of salary for the said period as negligible.

If there is an affirmance of the decree of the County Court, then, of course, there can be no question of the application of the rule that the right to the salary and the emoluments of the office attach to the true and not to the colorable title.

Waterman v. C. & I. R. Co., 139 Ill. 658.

Kreitz v. Behrensmeyer, 149 Ill. 496.

People ex rel. Sartison v. Schmidt, 281 Ill. 211.

Hence, in any event, on the present state of the record, Judge Finnegan would be entitled to the salary for the pe-

riod under consideration, and we recommend that it be paid to him.

We return the pay-roll herewith.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Vehicle License for Semi-trailers.

Chicago, January 2, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

We are in receipt of your letter of recent date concerning the application of the vehicle license provisions of the city ordinances to the class of vehicles described as "Semi-Trailers." You attached to yours a letter from The Cartage Exchange of Chicago, and we have also received a letter and two photographs from The Trailmobile Co. All these pertain to the same subject-matter.

The question presented is whether these vehicles are to be licensed as separate vehicles or as parts of the tractors to which they are attached, which would virtually put them on the same basis as motor trucks, although the combined vehicle has six wheels. While we hold that they are not to be separately licensed for the reasons given below, we believe that there should be some action taken by the City Council in order that the full intention with respect to them may appear in the ordinances.

Section 4067 of The Chicago Municipal Code of 1922 prescribes the license fees for the several kinds of vehicles.

It makes no specific provision for the tractors and trailers defined in Section 4034, although it mentions trailers. It would appear from the fact that trailers are mentioned while tractors are not spoken of that the Council intended to have the motor truck license fee apply to tractors. This conforms to the definition of the words "motor truck" in Section 4025.

What is called a "semi-trailer" is a vehicle which can be separated from the tractor that draws it, but which is so attached to the tractor that the whole becomes to all intents and purposes one vehicle with six wheels. Usually this is done by raising the two front wheels of the trailer so that they no longer touch the ground. It is represented that the purpose of detaching is for convenience in loading, and that there are usually three or four of these semi-trailers built for each tractor, so that they can be used interchangeably.

Under a strict interpretation a "semi-trailer" comes within the definition given for "trailer" in Section 4034. Nevertheless, when the whole article on "tractors and trailers," including Sections 4033 to 4043, was originally adopted, it was manifestly intended that the regulations included therein should apply to the very heavy vehicles which were then beginning to appear on the streets.

We are disposed to view this combination of tractor and semi-trailer when in such form as to make one compact vehicle in the same light as a wagon drawn by a team of horses. It was definitely decided by the City Council ten or twelve years ago that the vehicle tax should apply to a wagon and team of horses as a unit, and that if the same team was used on different wagons there should be no separate tax for each wagon, so that the vehicle license would cover the equipment that was used on the street as distinguished from that left in the barn.

That decision was brought about by the same sort of condition that is said to prevail with respect to semi-trailers; that is to say, where there are three or four vehicles for each propelling unit but only one can be on the street at a

time, it was looked upon as inequitable to charge each of the vehicles the full wheel tax.

With respect to their regulatory provisions applicable to semi-trailers, the Law Department had occasion to go into the matter some time ago, and an opinion was written thereon dated October 31, 1922. (See Opinions of the Corporation Counsel and Assistants, from January 1, 1920, to April 15, 1923, p. 735.) In this opinion the department took the position that, while the question was not free from doubt, until further action was taken by the City Council it would recommend that such an equipment (tractor and semi-trailer combined) should be classified as a truck and not as a tractor and trailer.

Although the opinion of the Law Department is not of any binding force on either the courts or the City Council, nevertheless, we believe that when the City Council has before it such an interpretation for a period of more than a year and takes no action looking towards a change in status, it has practically acquiesced in such interpretation.

We therefore believe that it would be proper to regard the combined vehicle as a truck with six wheels, the license fee to be based on the complete equipment that travels as a unit. This means that only the tractor need bear the vehicle license plate, but it should be of the kind required for the heavier trucks, for even though there may sometimes be light weights in the semi-trailers the capacity of the combined vehicle is bound to be more than one ton.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Vehicle License for Serbian Consul.

Chicago, January 3, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

We submit the following relative to the matter of the vehicle license of Dr. Bojidar Pouritch, the Consul of the Kingdom of Serbs, Croates and Slovenes:

The convention or agreement with the Serbian government (which we understand, survives and is in effect with the present kingdom) contained an article which provided that consuls shall be exempt "from all direct taxes, national, state or municipal, imposed upon persons either in the nature of capitation tax or in respect of their property, unless such taxes become due on account of the possession of real estate or for interest in capital invested in the country where the said officers exercise their functions." Ordinarily there is a proviso to such a clause in the convention which makes a partial exception in the case of a consul who is a citizen of the country to which he is accredited. We are not advised whether there is such an exception in the present instance, but we are informed that Dr. Pouritch is not a citizen, and therefore such an exception (if there is one) would not apply to him.

In our opinion the said consul is exempt from the vehicle license fee. Such license imposes a tax which seems to come squarely within the terms of the exemption provided for in the article from which we quote.

On May 5, 1922, an opinion was given by this department to the former City Collector on the question of the right to exact the vehicle license fee from the Vice-Consul of France. You call attention to this because the case was somewhat similar and the department held that the tax could be collected from him. There is, however, a clear distinction between the

two cases by reason of the language used in the two conventions. Under the agreement with France consuls are made exempt "from all direct and personal taxation," with this proviso:

"If, however, the said Consuls-General, Consuls, Vice-Consuls or Consular Agents are citizens of the country in which they reside; if they are, or become, owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts * * * as other citizens of the country who are owners of property, or merchants."

The car in that case belonged to the Vice-Consul personally, and it was regarded as coming within the clause making the owners of property liable for taxes. In the case before us the proviso applies only in case the consul owns real estate or has an interest in capital invested here.

We return herewith the two letters which you submitted with your inquiry.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of City to Use Patent of Strauss Bascule Bridge
Co. in Construction of Proposed Viaduct
at Roosevelt Road.**

January 3, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Under date December 18th you wrote this Department for an opinion as to whether the sum of money already paid

to the Strauss Bascule Bridge Company gives the city the right to use their patented device for the revised plan of the proposed bridge at Roosevelt road.

I have asked for a complete report on this matter from Mr. George A. Chritton, of Dyrenforth, Lee, Chritton & Wiles, the firm of patent attorneys who appeared as special counsel during the latter part of the Strauss litigation, and under date December 29th, I have his letter to me, which is as follows:

"We have carefully considered this matter and have investigated the entire situation and, while the whole affair is not as clear as we wish it were, we are inclined to the opinion that the City of Chicago will be safe in constructing a double leaf bascule bridge at Roosevelt road instead of the single leaf bascule bridge which was the type of bridge in contemplation at the time the settlement was made with the Strauss Bascule Bridge Company.

As a matter of fact, during all the negotiations which culminated in the settlement by which the City of Chicago paid to the Strauss Company the sum of \$348,500.00, as compensation in full for the construction of ten bridges across the Chicago River (one at Roosevelt road), nothing was ever said about an apportionment of this total sum among the various bridges; in other words, a lump sum was paid by way of compensation because of the damages arising from the construction and use of these ten bridges. We understand that the City Council, when it passed its order of October 8, 1920, approving the proposed settlement with the Strauss Company, divided this total of \$348,500.00 among the various bridges involved, apportioning the sum of \$64,914.00 to this Roosevelt Road Bridge. We likewise understand that this was purely an accounting or bookkeeping proposition and that it was not because of any understanding or arrangement with the Strauss Company.

In order that you may have the entire situation before you, we are attaching hereto a copy of the license granted to the City of Chicago by the Strauss Bascule Bridge Company, bearing date November 19, 1920, this license being issued under the Strauss Bascule Bridge Patent No. 975,813 (granted June 20, 1911), it being the patent involved in the Strauss Patent suit Equity No.

24, United States District Court, Northern District of Illinois. You will note that, this instrument merely states that the City is granted

'a license to use and operate the ten bascule bridges across the Chicago River at the intersection of the river with the following named streets:'

the instrument then naming the streets, including Roosevelt road.

The final decree, approving the settlement and confirming the report of Master in Chancery Morrison was entered by Judge Evans on November 19, 1920. This decree recites that a compromise agreement had been entered into whereby the City should pay to the Strauss Company the sum of \$348,500.00

'as full compensation to the said plaintiff because of said plaintiff's infringement of said Letters Patent in relation to ten (10) bridges across the Chicago River at the intersection of said river with the following named streets.'

the decree then naming these ten bridges including that at Roosevelt road (12th street).

The decree contained a further provision to the effect that the City of Chicago had infringed Claims 9 and 10 of said patent No. 995,813,

'by making and using bridges embodying the invention and improvement patented as aforesaid as charged in said Bill of Complaint, said bridges being ten (10) bridges over the Chicago River at the intersection of said River with the following named streets:'

the decree then naming these ten bridges including that at Roosevelt road.

The last paragraph of the decree provides that the defendant should be enjoined from infringing Claims 9 and 10 of said Patent No. 995,813

"provided, however, that this injunction shall not apply to any of the ten (10) bridges that cross the Chicago River at the intersection of the River'

with the streets theretofore mentioned in the decree, including Roosevelt road.

While it might be argued by the Strauss Company, with some degree of force and logic, that the bridge now in contemplation was not the bridge for which the license was granted by the Strauss Company and which was specified in the decree, we do not believe the court would take that view of it. We understand that the cost of the new bridge will probably not be greater (and it may

be less) than the bridge originally in contemplation for Roosevelt road; in other words, assuming that the plaintiff was entitled to a royalty or license fee based somewhat upon the cost of the bridge, in equity, it would not be entitled to any more royalty or license fee than it would have received on the basis of the construction of the bridge as originally planned.

But, utterly aside from that feature, the fact remains that the City of Chicago has paid a very substantial royalty for the privilege of constructing and using a bridge across the Chicago River at Roosevelt road, everybody concerned knowing that the bridge was then in contemplation only and that the plans had not been finally drawn. If the City sees fit now to change these plans, we do not believe a court of equity would require the payment of any further or additional royalty and certainly there would be no danger of an injunction.

It may be noted also that this Strauss Patent will expire on June 20, 1928, and it may be that the new Roosevelt Road Bridge, even if it be changed to a double leaf bascule bridge will not be completed before that time.

On the whole, we believe the City will be safe in changing the design of this bridge from the type originally contemplated as far as Claims 8 and 9 of the Strauss Patent No. 995,813 are concerned."

I concur in Mr. Chritton's report and in his conclusions.

Very truly yours,

FRANCIS X. BUSCH,

Corporation Counsel.

Interpretation of Ordinance Prohibiting Card Playing in Pool Rooms.

January 3, 1924.

HON. DONALD S. MCKINLAY, Alderman, 19th Ward.

Dear Alderman:

We have your inquiry of December 29, 1923, asking whether Section 341 of The Chicago Municipal Code of 1922 which reads as follows:

"341. Gambling.) No dice shall be thrown for money, nor shall cards, raffles, or other games of chance, or any form of gambling be permitted in any billiard room or in the room in which said tables are located, or at any cigar store or stand or any other business conducted in the same room.

This section, however, shall not be construed to prevent the giving of cash or merchandise prizes to billiard players in tournaments, league or any other competitive play."

can be construed to prohibit the playing of cards merely for pastime by patrons of a pool room.

We are of the opinion that it was the intention of the aldermen, in passing upon this provision of the Code to prohibit the playing of cards in any billiard room, and when such billiard parlor cannot prosper without card playing being permitted, then in that case a license ought not issue. This section no doubt was meant to separate the playing of cards from any other business conducted in the same room.

Yours very truly,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Equitable Casualty Underwriters as Surety for Teams Employed by the City.

January 8, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication dated November 21, 1923, concerning the attached Workmen's Compensation Policy No.

15504 and Teams Liability Policy No. 21951, issued by the Equitable Casualty Underwriters to Vincent Glowozewski, 3227 Elston avenue, who owns a team employed by the Bureau of Streets in the collection of garbage, ashes and other miscellaneous waste.

The Equitable Casualty Underwriters have evidently been incorporated under a recent statute effective July 1, 1921. The policies before us are reciprocal or interinsurance policies and insure or protect its individual members only. They are assessable, that is, in case this company wants or needs more money, the policyholders can be assessed over and above the premium already paid.

These policies do not protect against public liability. We take it, that what the City desires is public liability protection or insurance against liability that might be incurred on account of the actions or negligence of the team owner or his employe while in the performance of his work for the City.

From our examination of these policies we find that neither of them have a clause that protects the City in any way, shape or manner. We are of the opinion that they should not be accepted.

The Commissioner of Public Works no doubt has a right to demand that the City should be properly protected, and that the team owner should insure in an acceptable company.

We are returning herewith the policies submitted by you.

Very truly yours,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Collection of Compensation Under Ordinances Permit-
ting Placing of Tunnels Under Streets When
Tunnels are No Longer in Use.**

January 9, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of the 7th instant you asked to be advised concerning the enforcement of a provision for a minimum fee in the case of two ordinances granting special privileges of which the grantees are making no use at the present time.

In one of the ordinances that you mention it seems that while the grantee filed an acceptance and bond, it never availed itself of the privileges granted. In the other case the grantee operated under the ordinance for a while but no longer requires the conduit which it authorized, and therefore seeks to be relieved of the expense.

In our opinion, unless action is taken along the lines indicated below, the minimum compensation should be exacted.

The first of the ordinances mentioned above is the one granting to the Illinois Maintenance Co. the right to maintain a tunnel and pipes under and across West Adams street (Council Journal, December 23, 1918, pages 1336-7). By Section 4 of this ordinance the grantee is required to pay compensation at the rate of 3 per cent on the gross receipts, provided that the payments to the City shall not be less than \$100.00 per annum. By Section 2 the power to revoke the privilege is given to the Mayor, and there is provision made for amendment, modification or repeal by the City Council. The Company accepted the ordinance and filed its bond, in conformity with the provisions therein.

The other ordinance is one granting to John P. Boyle the right to install and maintain a conduit across the alley

east of Broadway near Ardmore avenue (Council Journal, December 13, 1916, pages 2531-3). The provisions for revocation, modification and repeal are practically the same as in the other ordinance. This conduit was built and used for a while, but its use is now discontinued, and it is assumed by the grantee that thereby his obligation to pay compensation has come to an end.

Both of the ordinances in question are contract ordinances. They are not to be regarded as mere licenses of which the grantee can take advantage or not as he sees fit. They remain in force until the term expires or something is done to end the contractual relationship. If it is the desire of the Mayor or the City Council to relieve the parties from their obligations the way is provided in the ordinances for doing so. If they are allowed to stand the grantees would probably be very quick to assert their rights under them in case there were some turn of affairs that would make it profitable to do so. A very effective way of putting an end to the rights granted, as well as to discontinue the exaction of compensation, is for the Mayor to revoke the grants on account of non-payment of compensation. Another way is for the City Council to repeal the grants. In neither event would such action relieve the companies of the obligation to pay the compensation that has already accrued.

Theoretically the granting of such privileges in streets and alleys is for the benefit of the public. It is true that this is more or less of a fiction in cases of this kind. Nevertheless, the law is that such grants cannot be made except for public purposes, at least nominally, although the fact that some incidental private advantage accrues will not invalidate the grant. This principle is irrevocably fixed by a long line of decisions of our Supreme Court. (See *People v. Clean Street Co.*, 225 Ill. 470; *People v. Corn Products Co.*, 286 Ill. 226, and authorities cited on p. 238.)

Since this is the law in the case the provisions for compensation in these ordinances should be lived up to. The expense to the city of enacting the legislation, the publication

of the ordinances in its printed compilations, the keeping of accounts made necessary thereby, and numerous other items that could be mentioned makes the minimum charge in such cases only reasonable. Besides, the Department of Finance cannot be put to the trouble and expense, in every such contingency, of making investigation to determine whether or not the privileges are being used. If they are not being used the presumption under the law is that the public is the loser.

We, therefore, beg to advise you that it will be proper for you to collect the minimum compensation under the ordinances in question until such time as they expire by limitation or the rights granted thereunder are otherwise terminated.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Distribution of Candy Sales Books as Constituting A Lottery.

January 9, 1924.

CHARLES J. COYNE, Esq.,
c/o Board of Education.

Dear Sir:

In reply to your request for an opinion as to whether or not the method of selling candy outlined in a booklet issued by the Maxwell-Edwards Co. constitutes gambling, we submit the following:

The book in question consists of 24 pages, and is gotten up in an enticing manner. We would judge from the suggestion to distribute it and to sell candy among "relatives, friends and neighbors" that it is designed to appeal par-

ticularly to children. The most prominent thing on the title page is the legend "Easy money and valuable premiums in your spare time." There is an order blank on one of the pages, and a "recommendation blank" underneath it on the same page. A commission of \$1.00 is held out as a payment to the person who makes the recommendation and a premium is given the person who sells the candy. There are 6 pages of illustrations and descriptions of what are called "reward premiums." There is a page containing a list of 40 numbers ranging from 10 to 65, with spaces opposite the numbers in which names of purchasers may be written. On the page back of this list there is a sheet pasted on in such a way that forty tabs containing numbers can be pulled off, each indicating the amount that the purchaser is to pay. This tab sheet is similar to the gambling devices with which you are doubtless familiar, by which the same article is sold for a variety of prices according to the number on the back of the tab. The distinguishing feature about this is that the prices paid call for different kinds of candy and different sized boxes and bottles, although we have no means of saying whether or not the amount and quality correspond in each case with the price, except so far as two pages of illustrations of the candy seems to indicate that such is the plan.

The manner of selling the candy outlined in the book provides for a distribution of books to those who apply for them, free of charge. The persons who receive the books have the privilege of putting in their names and addresses on the "recommendation blank," and then turning them over to other persons. These persons who receive the books in turn may start a selling campaign for the 40 boxes of candy, the total price of which is \$17.80. When the party who sells the candy sends this amount he is entitled to the "reward premium" which he selects and the 40 boxes of candy to be distributed among his purchasers. The person whose name appears on the "recommendation blank" at the same time receives \$1.00 as his commission for the sale, or more strictly speaking as his reward for advertising the plan.

If the candy that is distributed is proportionate to the price charged for same, then, technically speaking, this is no gambling scheme, although some of the language used, and the chance taken on the tabs would indicate that it is.

In order to constitute a lottery scheme or gambling transaction there must be three elements—consideration, chance and prize. The money paid, as per the tab drawn, is the consideration; the drawing of one of 40 different numbers constitutes the chances; but there is no prize, because the amount paid is for the quality and amount of candy that the consideration calls for. The “commission” and the “reward premium” go respectively to the advertising agent and the salesman.

The difficulty with handling this class of schemes is that they come so dangerously near being within the definition of gambling that the slightest change in the manner of handling the transaction would convert it into a gambling scheme. As an illustration, the person who makes the sales may have an understanding with the house that supplies the candy to the effect that when he sends in \$17.80 he is to get 40 boxes of candy all alike, which would convert this into a gambling transaction. Other schemes of like character could be worked.

The experiences of the Law Department has been that whenever it has given its opinion on some plan that simulates a lottery scheme or approaches gambling and held that it was lawful, the opinion has led to abuses, either by the party who first conceived the scheme or by others who have followed in his footsteps. We are therefore usually very reluctant about admitting that a plan of this kind is legal even where we feel that the facts presented do not warrant our holding otherwise.

Very truly yours,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Claim of Lumber Company for Rebate of Part of
License Fee When it Delays to Pay Fee
Until Fee Has Been Raised.**

January 10, 1924.

HON. GUY GUERNSEY, Chairman, Subcommittee of Committee
on Finance.

Dear Sir:

In your recent communication regarding the claims for refund of portions of the license fees paid by the Big Bay Lumber Co. for the year 1922, and by Louis Wuichet, Inc., for the year 1923, you ask an opinion from this department as to the right of the City to make such refunds.

It appears from the correspondence relating to these claims that in 1922 the ordinances of the City provided for a \$150 annual fee for lumber yards. On May 3, 1922 (Council Journal, p. 166), this ordinance was amended so as to make the annual fee for lumber yards \$200. The Big Bay Lumber Co. was issued a license on July 17, 1922, for which a fee of \$200 was collected. No reason is shown for the failure of the company to obtain a license for the year 1922 prior to July.

In the case of Louis Wuichet, Inc., it appears that the firm was granted a license as a lumber dealer without a yard on January 26, 1923, for which license a fee of \$100 was collected in accordance with the then existing ordinances. On June 13, 1923 (Council Journal, p. 486), the ordinance relating to lumber dealers without yards was amended so as to reduce the annual fee from \$100 to \$25.

Both firms claim that they are entitled to rebates for the reason that other firms in the same lines of business were allowed to carry on business for the same year upon the payment of a lesser fee.

We beg to advise that in our opinion such refunds cannot be made for the following reasons:

In both cases the license fees were paid in accordance with the terms of existing and *valid* ordinances. This fact does away with the possibility of a refund being taken care of by Council action, such action only being possible when the fees were paid although not legally due, as would be the case under an existing ordinance subsequently held to be invalid and unenforceable, or some similar state of facts.

While it is manifestly inequitable, as in the case of Louis Wuichet, Inc., that the man who promptly secures his license suffers merely because of his promptness in obeying the ordinances, and the one who delays is enabled to come out ahead by reason of a subsequent reduction of the fee, still such cases of individual hardship frequently occur. This may arise in the case of the repeal by the City Council of a license ordinance under which fees have been collected, in which event no recovery of the fee may be had, or in the case of a license ordinance being held invalid, where no recovery by suits is possible unless it is proven that such fee was paid under protest and the pressure exerted in attempting to collect the fee amounted to coercion.

The case of the Big Bay Lumber Co. presents no such question of unmerited hardship. Were it not for the fact that the company neglected to apply for a license until July of the year for which such license was sought, it would have had the benefit of the lower license fee required during the first four months of the license year. Surely it has no ground for complaint as to a condition imposed by its own lack of promptness.

Our opinion is that neither company is entitled to the rebates claimed.

Yours truly,

RUTH C. NELSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Effect of Marriage of Widow Drawing Pension From
Police Pension Fund on Additional Pension
Paid on Account of Minor Child.**

January 11, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and
Benefit Fund.

Dear Sir:

Replying to your request of January 9, 1924, for an opinion as to the right of the widow of Joseph L. Pijanowski to be paid \$10.00 per month for her daughter, Gladys Pijanowski, I submit the following:

Your letter states that Joseph L. Pijanowski died in the service November 18, 1920; that his widow was awarded a pension of \$50.00 per month and an additional sum of \$10.00 per month for her daughter Gladys, who was born December 12, 1915; that Mrs. Pijanowski has since married and that her December check is being withheld pending a legal opinion in the matter.

Section 50 of the Policemen's Annuity and Benefit Fund Act provides that widows and children of deceased policemen pensioned under the Act of 1915, as subsequently amended, shall have a right to receive pensions in accordance with the provisions of said Act, as subsequently amended.

The Police Pension Fund Act of 1915, as amended in 1917, provides as follows:

"After the death of any such policeman, his widow, in case the marriage of such policeman shall have taken place more than one year prior to the time a pension is granted him hereunder, shall receive a pension of fifty (\$50.00) dollars per month and an additional sum of ten (\$10.00) dollars per month for each of his children under eighteen (18) years of age. Should any such child cease attending school between the age of fourteen (14) and eighteen (18) years, the aforesaid sum shall be reduced to five (5) dollars per month."

Section 6 of the amendment of 1917, hereinabove referred to, contains the following provision:

“In case the widow of any policeman pensioned hereunder shall marry, the pension heretofore granted her shall at once cease and determine. No pension shall be paid for or on account of any such child attending school unless there shall be filed with clerk of said Board, at least once every six months, a certificate, signed by the principal or person in charge of the school attended by such child, stating that such child is a regular attendant of such school.”

While the Act provides that the pension to the widow shall cease upon her marriage, there is no provision terminating the payment to the widow of the additional sum of \$10.00 per month for each of the children under eighteen (18) years of age. As the pension fund was created for the benefit of policemen and their dependents, it should be liberally construed and nothing read into the Act disadvantageous to the beneficiaries of the pension fund. In the absence of a specific provision prohibiting payment of money for the support of a police pensioner's child, we must believe that it was the intention of the legislature that the child of a deceased police pensioner should not be deprived of any benefit under the Act because of the remarriage of the mother.

I am of the opinion that the “additional sum” heretofore paid on behalf of the daughter of the deceased pensioner, Joseph L. Pijanowski, should be continued, irrespective of the remarriage of the mother, in accordance with the provisions of the Act of 1915, as amended in 1917.

Payment on account of the minor should be made to the mother of the minor.

Yours respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Amount Due the City of Chicago From the Chicago
Railways Company, Chicago City Railway Com-
pany and the Southern Street Railway Company
as the City's 55% of the Divisible Net Re-
ceipts of Said Companies, Respectively, for
the Years Ending January 31, 1920,
January 31, 1921, January 31,
1922, and January 31, 1923.**

January 11, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller, Chicago.

Dear Sir:

The ordinance of February 11, 1907, authorizing the Chicago City Railway Company to maintain and operate a system of street railways in the streets and public ways of the City of Chicago, provides (Sec. 24) as follows:

“On or before the tenth day of April in each year the Company shall come to an accounting and settlement with the said City as of the thirty-first day of January last preceeding upon the following basis:

From the gross receipts of the said street railway system and property from all sources and of every kind for the year ending on said thirty-first day of January, there shall be deducted for such year:

First: (1) All expenses of operation, including maintenance, repairs and renewals; (2) all amounts contributed during said year and then held in reserve under the provisions of Sections 16 and 18 hereof; (3) all amounts paid out for taxes and assessments levied and imposed upon the real and personal property of the Company, including all capital stock or franchise taxes levied or assessed after the 31st day of January, 1907, but not including any taxes which may by any court be ordered to be levied, assessed or collected after the 31st day of January, 1907, on account of the failure of the Company or any person, firm or corporation owning or having an interest in the said street railways or property, to pay any taxes which should have been

paid for or on account of such street railways or property prior to the 31st day of January, 1907, and not including any sums paid by the Company to the City for city license fees, if any, exacted from the Company or its employes; (4) all salaries and expenses of the Board of Supervising Engineers by this ordinance authorized, after the period of "Immediate Rehabilitation;" and

Second: A sum equivalent to five (5) per centum per annum for said preceding year upon the amount of the cash purchase price which the said City would then be obligated to pay on account of the items specified in subdivisions 1, 2 and 3 of Section 20 hereof, if it were purchasing the property for municipal operation on such thirty-first day of January, interest being adjusted as to items added to such purchase price during said year. In case in any year the gross receipts shall not be sufficient to pay in full the items in the first and second paragraphs of this section mentioned, then the deficit shall be paid out of the gross receipts of the subsequent year or years.

DIVISION OF REMAINING NET RECEIPTS.

"After the deduction from the gross receipts of the items hereinbefore in this section provided, the amount remaining shall be considered as the net receipts for such year arising from the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: forty-five (45) per cent to be retained by the Company, and fifty-five (55) per cent to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceding year by the Company for City license fees, if any, exacted from the Company or its employes.

The ordinance of the Chicago Railways Company of February 11, 1907, contains, in Section 25, a similar provision, and like provisions are found in Section 22 of the ordinance of March 30, 1908, granting a franchise to the Calumet & South Chicago Railway Company, and Section 20 of the ordinance of March 15, 1909, granting a franchise to the Southern Street Railway Company.

On November 13th, 1913, an ordinance authorizing unified operation by the Chicago Railways Company, Chicago

City Railway Company, The Southern Street Railway Company and the Calumet & South Chicago Railway Company, was passed. In Section 1, of such ordinance, it is provided as follows:

“The companies are hereby authorized and required to enter into an operating agreement to enable them to carry out the foregoing provisions for such unified service, a copy of which agreement is hereto attached and marked ‘Exhibit A’ and made a part hereof. Such operating agreement shall be executed by the companies prior to the acceptance by them of this ordinance.”

Section 2 of the last named ordinance provides:

“The operating agreement mentioned in Section 1 hereof, and this ordinance shall be subject to all the terms, stipulations, requirements, conditions and obligations of the 1907 and subsequent traction ordinances of the City of Chicago, except so far as these ordinances are expressly or by necessary implication modified or supplemented by this ordinance.”

The “operating agreement” referred to in said last named ordinance, provides in Par. Seven, as follows:

Section 1. *Expense of Operation, etc.*

From the gross receipts from the unified operation of the Chicago Surface Lines from all sources of every kind for each year ending on the 31st day of January, there shall be deducted for such year, in accordance with the several and respective Traction Ordinances, the following:

(a) All expenses of operation as defined, required and incurred under the Traction Ordinances and the Unification Ordinance of which this agreement is a part, including maintenances, repairs and renewals and all damages and claims arising or growing out of injuries to persons or to the property of others, incident to the construction, reconstruction or operation of the Chicago Surface Lines; but not including any sums paid by the companies to the City for city license fees, if any, exacted from the companies or its employees:

(b) All amounts contributed during the said year and then held in reserve under the provisions of the several ordinances aforesaid with reference to maintenance, repairs and renewals and personal injury claims.

(c) All amounts paid out for taxes and assessments levied and imposed upon the real and personal property of the companies, including all capital stock or franchise taxes levied or assessed, after the 31st day of January, 1914; and,

(d) All salaries and expenses of the Board of Supervising Engineers, authorized by the Traction Ordinances.

In case in any year the said gross receipts shall not be sufficient to pay in full the several amounts mentioned in this section, then the deficit, if any, shall be paid out of the gross receipts of the subsequent year or years.

"Section 2. Division of Residue Receipts.

After the deduction from the gross receipts of the items hereinbefore in Section 1 of this paragraph mentioned, the amount remaining shall be considered as the residue of the gross receipts divisible between the companies for such year, arising from the unified operation of the Chicago Surface Lines, for convenience herein called 'residue receipts,' and shall be divided among the companies as follows:

(a) During the period of two years beginning February 1, A. D. 1914, fifty-nine (59) per centum of said residue receipts shall be paid to the Railways Company and forty-one (41) per centum shall be paid to the City Company, including the Calumet Company and the Southern Company.

(b) During the remainder of the period covered by this agreement, sixty (60) per centum of said residue receipts shall be paid to the Railways Company, and forty (40) per centum shall be paid to the City Company, including the Calumet Company and the Southern Company.

"Section 3. Division of Net Receipts Between City and Railways Company.

The Railways Company, from its percentage of the residue receipts as defined in the foregoing Section 2 shall deduct a sum equivalent to five (5) per centum per annum for said preceding year upon the amount of the cash purchase price of the properties of the Railways Company which the City would then be obligated to pay under the Railways Ordinance of 1907 and the ordinance of October 10, 1910, if it were to purchase said property for municipal operation on the 31st day of January aforesaid, interest being adjusted as to items

added to said purchase price during said year. In case in any year the Railways Company's percentage of said residue receipts shall not be sufficient to pay said five (5) per centum per annum upon said purchase price, then the deficit, if any, shall be paid out of the Railways Company's percentage of the residue receipts of the subsequent year or years.

After the deduction of the five (5) per centum aforesaid, the amount remaining shall be considered as the divisible net receipts for such year of the Railways Company arising from the unified operation of the Chicago Surface Lines, and shall be divided between the Railways Company and the City in the following proportion: Forty-five per centum (45%) to be retained by the Chicago Railways Company, and fifty-five per centum (55%) to be paid by the Chicago Railways Company to the City, crediting thereon all amounts paid during the preceding year by the company for city license fees, if any, exacted from the company or its employees.

"Section 4. Division of Net Receipts Between City and the City, Southern and Calumet Companies.

The City Company from its percentage of the residue receipts as defined in Section 2 of this Paragraph Seven to be paid to it (for division among the City Company, the Southern Company, and the Calumet Company, as aforesaid), as in the foregoing Section 2 of this Paragraph Seven provided, shall deduct a sum equivalent to five (5) per centum per annum for said preceding year upon the aggregate amount of the cash purchase price of the total properties of the City Company, the Southern Company, and the Calumet Company, which the City would then be obligated to pay under the City Ordinance of 1907 and the Calumet and Southern Ordinances aforesaid, if it were to purchase said properties for municipal operation on such 31st day of January, interest being adjusted as to items added to such purchase of said several and respective companies during said year. In case in any year said percentage of residue receipts payable to the City Company as aforesaid shall not be sufficient to pay the said five (5) per centum, then the deficit shall be paid out of that portion of the residue receipts of the subsequent year or years, payable to the City Company as aforesaid.

After the deduction by the City Company from the percentage of the residue receipts payable to it as aforesaid of the five (5) per centum aforesaid, the amount remaining shall be considered as the aggregate divisible net receipts of the City Company, the Calumet Company and the Southern Company arising from the unified operation of the Chicago Surface Lines, and shall be divided among said three companies and the City in the following proportion: Forty-five per centum (45%) to be retained by the City Company, including the Calumet Company and the Southern Company, and fifty-five per centum (55%) to be paid to the City by the City Company (for itself and for the Calumet Company and the Southern Company), crediting thereon all amounts paid during the preceding year by said three companies, or any of them for city license fees, if any, exacted from said companies, or any of them, or their employes,—the said forty-five per centum (45%) to be retained by the City Company to be divided among the City Company, the Calumet Company, and the Southern Company upon such basis as they shall agree upon.”

No payments were made by the several Street Railway Companies under the provisions of these ordinances after April 10, 1919, until October 20, 1923, but offers were made by the respective companies as follows:

By the Chicago Railways Company:

April 10, 1920.....	\$1,004,372.22
April 10, 1921.....	1,406,626.32
April 10, 1922.....	1,848,367.57
April 10, 1923.....	1,110,392.89

By the Chicago City Railway Company for itself, Calumet & South Chicago Railway Company and the Southern Street Railway Company:

April 10, 1920.....	\$ 442,990.71
April 9, 1921.....	737,989.97
April 10, 1922.....	1,075,744.78
April 10, 1923.....	552,654.06

The offers above mentioned were in each case made by check and in each case refused, the ground of the refusal

being that the rights and liabilities of the Street Railway Companies under the several ordinances had been terminated by the action of the companies in applying for and securing from the Public Utilities Commission an order permitting them to increase the rate of fare for carrying passengers and putting such orders into effect.

On October 20th, 1923, the same checks which had been previously offered as above set forth, were offered to and were accepted by the City, subject to the right of the City to verification as to the actual amount due and without prejudice to any rights the City might have to recover interest.

We are of the opinion that an immediate audit of the companies' books should be made under the direction of the City for the following reasons and for the following purposes:

First: The City should ascertain the principal amount actually due to it from the several companies, on April 10, 1920, and each of the years 1921, 1922 and 1923. As we understand it, because of the pendency of the suit of the *City of Chicago v. Chicago Railways Co., et al.*, No. B. 57959, in the Circuit Court of Cook County, which was instituted for the purpose of procuring a decree declaring the rights of the Company under the settlement ordinances of 1907 to be forfeited (which said suit was dismissed on the 19th day of October, 1923, for the reasons set forth in the opinion submitted by the Mayor to the City Council on October 17, 1923), no audits of the companies' books have been made since 1919. The City therefore has no information except from the companies' statements as to the amounts due the City as its fifty-five per cent (55%) of the divisible net receipts, and does not know whether the checks so offered and finally accepted on October 20, 1923, cover the full amount of the principal sum so due.

Second: If, at the time of the making any of the respective offers, any company did not offer the full amount of the principal sum then due the City, in our opinion the

City is now entitled to recover not only the amount of such deficit, but also interest on the principal sum actually due from the date of the offer.

Our statute on interest provides that a creditor is entitled to recover interest accruing under the statute at the rate of five per centum (5%) per annum "for all monies after they become due, on any bond, bill, promissory note or other instrument of writing" (Cahill's Revised Statutes, 1923, Ch. 74, Sec. 2).

A tender by a debtor to his creditor of the amount owing, stops interest, but such tender to have that effect must be of the full amount due (38 Cyc., pp. 137, 138).

It is true that the City did not at any time object to any offer on the ground that it was insufficient in amount, and it has been held that a failure to so object waives the right to object for that reason thereafter, so far as the tender was necessary to preserve some right of the tenderer. The rule, however, does not seem to be the same when the question of the creditor's right to interest is concerned.

In *Thayer v. Meeker*, 86 Ill. 470, where the vendor of property refused a tender of an installment of the purchase price on the ground that the contract had been forfeited, the vendee filed a bill to compel specific performance. On the hearing the vendor contended that the tender was not good because the amount was insufficient. The court held that as the only reason given at the time of the tender for refusing it was that vendee's rights under the contract had been forfeited, the vendor could not, on the trial, dispute its sufficiency, and thus defeat the right to specific performance. But on the question of the right of the vendor to interest, the court said (p. 474):

"It is, however, urged, that as appellee claims to have made such a tender as will release him from interest on the balance due, he must prove a strict legal tender, as well the exact amount then due, and that he has kept the tender good. This position is correct. To avoid the payment of interest after a tender, the debtor must tender the exact amount due, and he must keep

that money ready at all times to pay it to the creditor if he should conclude to receive it and demand its payment. He cannot use it, make profit from its use, and then escape the payment of interest when he comes to force the creditor to receive it. The debtor escapes payment of interest upon the supposition that the money should have been received by the creditor, and that the debtor has set it apart for him, and has thus been deprived of its use and prevented from making a profit on it."

Third: We recommend that the auditors ascertain whether the companies' bank balances have been sufficient at all times to meet the checks so offered to the City as well as all other checks drawn against such balances. A tender, to avail the tenderer so far as the stopping of interest is concerned, must at all times be kept good. The tenderer must at all times have the money ready to pay to the creditor if demanded.

The rule is stated by the authorities as follows:

26 R. C. L., 648:

"When it is said that tender must be kept good it is not meant that the identical money tendered must be kept; it is sufficient if the party holds himself ready to pay at all times. This rule must be understood with the qualification that the readiness to pay must be specific rather than general, that the amount of the tender must be reserved by the debtor from his general funds in readiness to be paid at any time called for. If the rule were otherwise a man of large means might be ready to pay at any time in the sense that he could secure extension, service and books of account of the Surface the money easily and still at the same time not have the amount on hand. However, the tender has been kept good, although there has been no setting aside of that fund, if, at all times after the tender, the debtor has had on hand sufficient cash to pay the debt."

Angler v. Clay, et al., 109 Ill. 487.

In an action for specific performance of a contract for the sale of lands, the vendee contended that the vendor was not entitled to interest, because the principal amount due had been tendered the vendor and refused by him. But the

court allowed interest on the ground that the tender had not been kept good, saying (p. 492):

“It is claimed that Clay made a tender when the note matured and was thereby released from paying interest on the balance of the purchase money after the tender was made. We will not stop to discuss the question whether there was a sufficient tender, as, if there was, it was not kept good, so as to stop the accruing of interest. To have that effect the tender must be kept in money, at all times ready to be paid, and subject to the order of the creditor at any time when he shall comply with his contract so as to be authorized to receive it. This is the general doctrine and is well settled in this court. (*Thayer v. Meeker*, 86 Ill. 470; *Crain v. McGoon*, *id.* 431; *Stow v. Russell*, 36 *id.* 18; *Knox v. Light*, 12 *id.* 86). These cases distinctly announce the rule that the money tendered must at all times be kept in readiness for the creditor, and not used by the debtor, and when pleaded at law, it must be brought into court for the creditor. It is in this way only that the debtor can escape the payment of interest and costs.”

Further, on page 493, the court said:

“Where a legal and proper tender of personal property is made, the title vests in the person to whom it is made, and he becomes the owner. Although the identical money tendered does not vest in the creditor, it so far becomes his, if the tender is kept good and is brought into court, that he cannot recover any interest, costs or damages if the tender is for the proper amount and all the requirements of law were observed in making it—hence the debtor by using the money virtually withdraws his tender and makes it his own. It may be the precise pieces of money need not be kept separate but the amount must be kept at all times subject to be received by the creditor when he calls for it.”

Where one made a tender of the amount due his creditor, and the tender being refused deposited the amount in a bank in his own account, and afterwards checked against the account, reducing it below the amount of the tender, it was held that the tender was not kept good. (*Healy v. Protection Fire Ins. Co.*, 213 Ill. 99).

In an account by a vendor to compel specific performance of a contract for the sale of land, defendant contended that he should not be charged with interest on the unpaid balance, nor with costs, because he had tendered such balance before the commencement of the suit. In holding against the vendee the court said :

“One of the statements of fact in the case sets forth that Mr. Bissell tendered the money, and fails to state that he deposited it, or in any manner set it apart or appropriated it for the purpose of the tender. The other states that he used the money he had thus provided. The legal effect is the same. To have the effect of stopping interest or costs, a tender must be kept good, and when used by the debtor for other purposes it ceases to have that effect.

Bissell v. Hayward, 96 U. S. 580; 24 L. Ed. 678.

Fourth: The auditors should ascertain whether the various companies have received interest on the amounts, if any, kept in the bank to meet these various checks. When these checks were offered to the City, the money represented by them became virtually the money of the City. If interest was paid by the banks to the companies on such money the City now is entitled to receive such interest.

The case of *Bassett v. Kinney*, 24 Conn. 267 is in point. There, the New Haven and New London Railroad Co. deposited with Kinney, as treasurer of New London County, for the use of Bassett, the sum of \$8,000, being the amount of damages awarded to Bassett for certain land taken by the company for purposes connected with the road, and at the same time paid Kinney $2\frac{1}{2}\%$ on the amount deposited as Kinney's commissions for receiving, keeping and paying over the sum. Kinney deposited this money in a bank where it remained a little over a year, when upon the application of Bassett, Kinney paid it over to Bassett. After the money had been so paid to Bassett, the bank allowed and paid to Kinney 4% on the amount of the deposit for one year. Bassett when he learned of the amount of this interest paid to Kinney, demanded the same of him, which Kinney refused to pay, and thereupon Bassett brought an account

against Kinney for money had and received. The court held that Bassett was entitled to recover, saying (p. 269):

“The money, when deposited by the railroad company in the hands of Kinney, became the property of the plaintiff. It was substituted by the company for the land, which they had taken for their use. The interest, paid by the bank was paid for the use of the plaintiff’s money, and became as much his property as the principal itself.

It was upon this principle that the case of *Willis v. The Commissioners of Appeals in Prize Causes* proceeded, 5 East. 22. There a portion of the cargo of a captured ship had been condemned and sold by agents appointed for that purpose. Upon an appeal to the commissioners, the decree of condemnation was reversed, and the agents were ordered to pay over to the owners the net proceeds of the sale, together with the interest from the time of the sale. Upon an application to the court of King’s Bench for a prohibition against further proceedings relating to the payment of interest, that court refused to interfere, upon the ground that it was to be presumed that the commissioners had found that the *agents had made interest from the funds in their hands, and if so, they were accountable for it*. Lord Ellenborough, C. J., said: ‘The case is not brought forward on the ground of contract, but simply on the ground that the proceeds had got into the hands of the agents, and have there grown and accumulated, producing the interest sought to be recovered.’ And LeBlanc, J., remarked, that taking *interest to have been made*, he considered it as *composing part of the proceeds*.

“And in the case of *Rogers v. Boehm* and others, where the plaintiff sought to recover interest upon money remitted to the defendants, Lord Kenyon observed that there were cases in which the rules of equity and law were the same; that it had been decided, in a court of equity, ‘that if money had been remitted to an agent, and he suffered it to remain dead in his hands, he should not be liable to interest, but that if he mixed it with his own, or made use of it, he should be subject to the charge of interest.’ 2 Esp. Cas. 703.

“It is true that Kinney was under no obligation to place the funds deposited with him as treasurer of the county upon interest. Had he locked them up in his

chest, or merely deposited them in the bank for safe-keeping, and received no compensation for the use of them, he would not have been accountable for interest. *But having placed them where they drew interest, that interest must be considered as having the same ownership as the principal which produced the interest.*

"A similar rule applies to funds in the hands of executors and trustees. It was formerly held that, as they were not bound to lend, and if they did so it was at their peril, and as they were liable to bear the loss, they were entitled to the gain. But that doctrine was overruled by Lord Thurlow, and an executor or trustee may now be considered as chargeable with interest wherever he appears to have made interest. 2 Fonb., Eq. 183, note; *Newton v. Bennett*, 1 Bros. Chan., R. 359. (Italics ours.)

And generally it is held that one who holds money for another and receives interest on money so held, is liable to account, not only for the principal sum, but for any interest so received. Thus, it is said (1 Perry on Trust, 6th Ed., Sec. 439, p. 692): "All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation." And again, "Partners stand in a fiduciary relation to each other, and if a partner, instead of winding up the partnership affairs when for any reason he ought to do so, continues to use the partnership property in business and makes a profit thereon, he must account for it."

It is generally held that administrators of the estates of deceased persons who receive interest on the money of the deceased must account for such interest.

24 C. J., 73.

Haines v. Hay, 169 Ill. 93.

An agent must account to his principal for interest received by him on the money of the principal.

31 Cyc., 1480.

Fifth: If the companies received interest on this money, their subsequent failure to offer such interest may have had the effect of making the former tenders invalid. If so, the

City now would be entitled to interest at five (5%) upon the various principal amounts due from their respective due dates. In *Thayer v. Meeker*, *supra*, the court said, concerning the use by the debtor of money tendered:

“He cannot use it, make profit from its use, and then escape the payment of interest when he comes to force the creditor to receive it. The debtor escapes payment of interest upon the supposition that the money should have been received by the creditor, and that the debtor has set it apart for him, and has thus been deprived of its use and prevented from making a profit on it.”

In *Fannin, Admr., v. Thompson*, 50 Ga. 614, the debtor in payment of his debt tendered certain interest bearing confederate notes and state bonds, under an alleged agreement on the part of the creditor to receive such notes and bonds in payment. After the tender, the debtor clipped the interest coupons and collected the interest as it accrued. He also collected the interest on the notes. It was held that such collection of the interest by him vitiated the tender. The court said:

“A tender must be a continuing tender. The debtor must be able all the while to meet the call for the articles tendered without any depreciation or lessening of their value resulting from any act of his. When, in this case, he cut off the coupons or collected the interest on the 7-30 notes, they were not then what they were when he offered them to his creditor. If the bonds and notes were the property of the creditor by virtue of the tender, so was interest which had accrued and which had thereafter accrued. The debtor’s collection of that interest and appropriating it to himself lost him any further right to demand their acceptance by his creditor in their mutilated state.”

While the facts in the present case are not exactly like the facts in *Fannin v. Thompson*, still it would seem that the principle there applied is applicable here. While here moneys and not bonds were offered, if interest accrued on the moneys after the offer and that interest was received by the companies, it would seem that the companies had

really appropriated the fund to their own use and that they have no more kept the offer good than if they had invested the money for the purpose of securing profit from it and taken the profit to themselves.

Sixth. Section 28 of the ordinance of the Chicago City Railway Company (and there is an exactly similar provision in each of the other ordinances) provides that “* * * the company shall make daily deposit, with some depositary, or depositaries, authorized by this ordinance, of all moneys received by the company from the operation of said street railways and property, and shall make appropriate provision for the payment of reasonable interest on the moneys so deposited by such depositary and depositaries, which interest shall be added to and be held and considered as a part of the gross receipts of the said street railway system and property.”

If the City be entitled to nothing more, it was at least entitled to receive 55% of any interest received by the companies on the amounts represented by the checks.

. Mr. Henry A. Blair, of the Chicago Railways Co., in a letter dated November 17, 1923, states that the several checks were drawn against funds on deposit at the banks named in the respective checks; that the checks in question were treated by the Chicago Railways Co. as outstanding checks and at the end of each month the accounts of the Chicago Railways Co., against which the several checks were drawn, were credited by the banks with interest at the rate of 2% per annum on the average daily balance.

Mr. Leonard A. Busby, in a letter dated October 26, 1923 (both the letter of Mr. Blair and Mr. Busby, above mentioned, being addressed to the counsel for the Local Transportation Committee), stated that the checks were drawn upon funds on general deposit on “joint account” of the Chicago City Railway Co., and that the “joint account” was credited by each bank at the end of each month, with interest at the rate of 2% per annum on the average daily balance, which interest was retained by the Chicago City Railway

Co. The "joint account" mentioned by Mr. Busby is the "joint account" mentioned in the operating agreement quoted on pages 4, 5, 6 and 7 of this communication.

It thus appears that the companies have received interest at the rate of 2% per annum on the moneys represented by these checks, and the City should be entitled, if nothing more, to 55% of the interest so received.

Upon receipt of your report of audit, we will advise you upon the facts found, whether the companies may be required to pay interest.

Very truly yours,

WILLIAM H. HOLLY,
WM. H. SEXTON,
STEPHEN A. FOSTER,
JEROME N. FRANK,

*Special Assistant Corporation Counsel
Assigned to the Committee on Local
Transportation.*

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of Abutting Land Owner to Maintain Tunnel
Under Street in Which City Has Only an
Easement, Without Paying the
City Compensation.**

January 11, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have received your request for an opinion relative to the right of the City of Chicago to require the removal of a tunnel used to carry steam pipes under the surface of North

Franklin street at a point approximately 50 feet south of Institute Place. This tunnel is used to transfer steam between the property located on the east side of the street, occupied by the Chapin Estate, and the property located on the west side of the street, occupied by the Gormully Estate. In this connection, you have transmitted to us a copy of the communication received from the attorneys representing the trustees of the estate of Chas. A. Chapin, in which they contend that the City has no right to require the removal of this tunnel or to exercise any authority whatsoever in regard to the maintenance of this tunnel. For the following reasons, we are inclined to agree with this contention:

The southeast corner of Institute Place and North Franklin street, Chicago, Illinois, is part of the subdivision known as Johnston, Roberts & Storr's addition to Chicago, the plat of which subdivision was originally recorded July 12, 1838, in Book H of Maps, page 319. The original plat was destroyed by fire in the County Recorder's office so that, at the present time, there is no plat on record of this addition to Chicago. However, it is safe to say, that all plats recorded prior to the fire, and destroyed by fire, were common law dedications.

The Supreme Court of Illinois has repeatedly held that when a plat is filed which does not comply with the requirements of the statute and is a common law dedication, as contra-distinguished from a statutory dedication, that the fee to the land in the streets and alleys platted remains in the abutting land owners. The City has only an easement over these streets and alleys (*Sears v. City of Chicago*, 247 Ill. 204, and cases there cited). Consequently, the City of Chicago, having only an easement over streets and alleys which have been dedicated by a common law dedication, may not interfere in any way with the use which abutting property owners may see fit to make of the land under the same. So long as nothing is done which will in any way interfere with the traffic over the streets and alleys or in any way hinder or impede the use of the streets and alleys by the City for such

uses as travel, or the laying of pipes or wires or sewers or any other of the common uses to which streets are put, the abutting property owner may do as he pleases with the land under the street.

In conclusion, therefore, we desire to advise you that unless the tunnel for steam pipes maintained under North Franklin street near Institute Place in any way interferes with the traffic over said street, or in any way interferes with the laying out of pipes, and conduits by the City for municipal purposes, the City of Chicago has no right to interfere with the maintenance and operation of this tunnel.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of City to Compel Illinois Central Railroad to
Place Tunnel Under Viaduct, or, in Lieu Thereof,
to Build the Tunnel Itself—Whether Same
Would be a Local Improvement.**

January 12, 1924.

ALD.. GEORGE M. MAYPOLE, Chairman, Committee on Track
Elevation.

Dear Sir:

The office of the Corporation Counsel has received your request for an opinion relative to the rights of the City of Chicago to compel the Illinois Central Railroad Company to build a subway under its elevated tracks at 54th Place and Cornell avenue. There has also been received a petition from the property owners in this neighborhood, requesting that

this subway be opened for pedestrians, and a blueprint showing the location of the proposed subway. This question has been carefully examined with regard to both the power of the City to condemn the land under the tracks of the Illinois Central Railroad for the purpose of building a subway and with regard to the proper procedure to be followed for this construction.

The tracks of the Illinois Central Railroad Company between 51st and 67th streets were required to be elevated by an ordinance passed by the City Council May 23, 1892, and published on pages 223 to 225 of the Council Proceedings for the year 1892-93. This ordinance provided that the elevated roadbed should be constructed upon a solid embankment of earth or other suitable material. It was then further provided that viaducts should be constructed at certain streets, in order to allow the convenient passage of pedestrians, vehicles and traffic generally underneath the tracks. It was provided in Section 3 of said ordinance that open spaces should be left in the embankment for all streets crossing the right of way of the Illinois Central Railroad Company at that time. This ordinance was amended February 7, 1916, and published on pages 3198 to 3210 inclusive, of the Council Proceedings for the year 1915-16. The amendment provided for certain reconstruction work to be done in connection with the elevated tracks in the vicinity aforesaid, but no new openings were provided for. The present situation is a viaduct at 53d street and a viaduct at 55th street. There is no opening of any kind, nor any passage over the said tracks at 54th street, or 54th place. The result is that a great deal of inconvenience is caused pedestrians, in that they are obliged to walk several blocks to circumvent the elevated tracks in the vicinity of 54th street or 54th place, and Lake Park avenue, and the same inconvenience is caused pedestrians on the east side of the tracks at Cornell avenue and 54th street and 54th place. Therefore it would seem that a tunnel for pedestrians under the said tracks affording a means of access from Lake Park avenue and 54th place to Cornell avenue and 54th place, would constitute a desirable improvement. However,

the question of the desirability of this improvement is, in the last analysis, a question for your committee to decide upon. The scope of this opinion will be relegated to setting forth the power of the City to effect this improvement.

An examination of the plat and tract index of the property which would be affected by the proposed tunnel shows that on the east side of the Illinois Central Railroad Company's elevated tracks there is a public alley which would connect with the proposed tunnel and which could be used to afford egress to pedestrians to Cornell avenue. On the west side of the tracks of the Illinois Central Railroad Company there is no public street or alley which connects with Lake Park avenue. There would have to be condemned the south eighteen feet of Lot Five, Block Thirty-nine of Hyde Park. That strip, which adjoins property owned by the City of Chicago and which is used by the City for a fire station, is at present owned by William B. Austin of Cook County, Illinois, according to a deed known as Document Number 7977854, Book 18877, page 384, dated June 1, 1923, and recorded June 13, 1923. Therefore, in order to secure egress to Lake Park avenue, it would be necessary for the City to acquire by purchase or condemnation this eighteen foot strip of land as aforesaid.

The land under the elevated tracks of the Illinois Central Railroad Company, being owned in fee by that company, would also have to be purchased or condemned.

The first question to be considered is whether this improvement is a public improvement, to be paid for by general taxation, or whether it is a local improvement, to be paid for by special assessment. The Supreme Court of Illinois in the case of *City of Waukegan v. DeWolff*, 258 Ill. 374, has distinguished a local from a public improvement in the following language:

“A ‘local improvement’ has been defined to be a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property as distinguished from benefits diffused by it through-

out the municipality. *City of Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412. * * *

"These and other cases demonstrate that the question whether an improvement is a local one, within the meaning of the constitution and statute, does not depend upon the fact that there are incidental or indirect public benefits for which an equitable portion of the cost may be assessed to the municipality, as contemplated by the statutes, and so determined by the fact that some property in the municipality is benefited to a greater degree than other property, but does depend upon the nature of the improvement and whether the substantial benefits to be derived are local or general in their nature. If its purpose and effect are to improve a locality, it is a local improvement although there is incidental benefit to the public; but if the primary purpose and effect are to benefit the public, it is not a local improvement, although it may incidentally benefit property in a particular locality."

In order, then, to determine whether the construction of a tunnel under the Illinois Central Railroad Company's tracks constitutes a local or public improvement, the question must first be determined of whether or not the adjacent property is enhanced in value and receives most of the benefit of the improvement, or whether the public at large will receive the major portion of the benefits accruing from the improvement. In the same case of *City of Waukegan v. DeWolff*, 258 Ill. 374, the court considered the question of whether the construction of a viaduct to connect two streets which were severed by a ravine constituted a local improvement or a public improvement. The court said:

"Counsel for the appellant has correctly stated the purpose of the improvement in this case to be the restoration of the continuity of the street, which had been severed into two parts by the ravine which bisected it. The effect of the improvement, when made, would be to restore to the public the use of the principal thoroughfare of the city. The improvement was projected primarily for the public benefit and not to convert the street in front of adjacent property into a passable condition or to benefit such property, and such an improvement is substantially different from the one held to be a local

improvement in *Louisville & Nashville Railroad Co. v. City of East St. Louis*, *supra*, which is the main reliance of counsel for appellant. It is true that in both cases the improvement consisted of a viaduct, but in that case there was a street in regular public use across railroad tracks. The improvement consisted of a viaduct over the tracks, by which travel would undoubtedly be less dangerous, and that benefit would accrue to the public. The Railroad companies were subject to all the regulations of the law in relation to the operation of their trains at the street crossing, and the viaduct would result in benefits peculiar to their property. There was incidental benefit to the public, but the substantial benefits were to the railroad property. It was held that the special assessment was not rendered unlawful merely because the viaduct would extend across Cahokia creek and serve the purpose of a bridge over that stream, because it would be impossible to construct the viaduct without crossing the creek, and the evidence showed that the cost would not be increased thereby, so that the railroad companies were paying nothing for the extension across the creek. If the railroad companies had been called upon to pay for an improvement consisting of a bridge across Cahokia creek, as was attempted in this case, a very different question would have arisen."

Both in the instant case and in the aforequoted cases of *City of Waukegan v. DeWolff*, no means was provided for crossing the obstruction until the viaduct, or tunnel, as the case may be, had been put in. And the Supreme Court held that such an improvement was a public improvement in that the benefits arising therefrom, inured, primarily, to the public at large. It might also be noted that in the case of *City of Chicago v. Rumsey*, 87 Ill. 348, a tunnel was constructed in La Salle street under the Chicago river. This improvement was effected by general taxation, as a public improvement and not by special assessment. Therefore, it seems clear that the instant improvement is a public improvement and must be financed by the proceeds of general taxation.

The City of Chicago has power to condemn land for the purposes of constructing tunnels and opening connecting streets. These powers are clearly conferred by the following

paragraphs of Section 1 of Article V of "An act to provide for the incorporation of cities and villages," approved April 10, 1872.

"Section 1. The City Council in cities, and the president and the board of trustees in villages, shall have the following powers:

Seventh—To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

Twenty-eighth—To construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof."

Although the opening and laying out of a street is, in itself, properly a local improvement, nevertheless, when done in connection and as an incident to the construction of the tunnel aforesaid, it becomes a part of the entire public improvement.

As the aforequoted language in the case of *City of Waukegan v. DeWolff* would indicate, every public improvement partakes of incidental benefits to the particular locality, but if the great majority of the benefits are benefits to the public, and the benefits to the locality are only incidental, the nature of the entire improvement remains a public improvement.

It is suggested that it would be far more feasible and would involve less inconvenience if the purchase of these rights of way could be arranged. However, if the owner of the eighteen foot tract of land aforesaid, and if the Illinois Central Railroad Company refuse to sell the easement required for a reasonable consideration, they can be forced to part with them by instituting condemnation proceedings. It is suggested, that, since the Illinois Central Railroad Company would not be giving up any valuable right in their property by allowing the construction of a subway or tunnel underneath their tracks at this point, the City ought to be able to induce the Illinois Central Company to part with these rights for a purely nominal sum.

As a practical expedient, we recommend that this matter be referred to the City engineer for an estimate of the cost

of construction. It will probably be found necessary to install concrete retaining walls and steps. Some means must be adopted to insure the proper drainage of the said tunnel and also proper lighting. It may also be necessary to police it. The eighteen foot strip of land, above referred to, will have to be paved, and it may be found necessary to re-pave the alley connecting the proposed passageway with Cornell avenue, in order to render the same fit for use by pedestrians. If after receiving the estimate as aforesaid it shall be found advisable, in the estimation of your committee, to proceed with this improvement, a request should be sent to the Corporation Counsel to draw up ordinances authorizing the City real estate agent to purchase the easements necessary for the construction of this tunnel and its connections as aforesaid. If the City real estate agent should find that the owners of this property refuse to sell the easement required for a reasonable price, the matter should then be put in the hands of this office for the institution of condemnation proceedings to acquire this property. After the property shall have been acquired, the cost of said improvement shall be paid for and the construction of the improvement shall be accomplished as provided in the following sections of Article IX of "An act to provide for the incorporation of cities and villages," approved April 10, 1872.

"Section 16. When the ordinance under which said improvement is ordered to be made shall provide that such improvement shall be made by general taxation, the cost of such improvement shall be added to the general appropriation bill of such city or village and shall be levied and collected with and as a part of the general taxes of such city or village.

"Section 50. Any work or other public improvement, except any work or public improvement to be paid for in whole or in part by a special assessment shall, when the expenses thereof shall exceed \$500, either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance (provided, however, any such contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or trustees elected); or

such work or other public improvements shall be constructed in the following manner, by a vote of two-thirds of all the aldermen or trustees elected, to wit:

"The Commissioner of Public Works or other proper officers to be designated by ordinance, shall superintend and cause to be carried out the construction of such work or other public improvement and shall employ for the performance of all manual labor thereon, exclusively laborers and artisans whom the City or village shall pay by the day or hour, and all material of the value of \$500 and upward used in the construction of such work or other public improvement, shall be purchased by contract let to the lowest responsible bidder in the manner to be prescribed by ordinance."

"In every city which has adopted an act entitled, 'An act to regulate the Civil Service of Cities,' approved and in force March 20, 1895, every such laborer and artisan shall be certified by the Civil Service Commission to the Commissioner of Public Works or other proper officer, in accordance with the requirements of said act entitled, 'An act to regulate the Civil Service of Cities.' (As amended by act approved May 26, 1911.)"

In conclusion, we desire to advise you that the City of Chicago has no power to compel the Illinois Central Railroad Company to build a subway under its elevated tracks at 54th place and Cornell avenue, because the original ordinances, hereinabove referred to, requiring the tracks to be elevated, did not provide for openings at those streets. However, the City of Chicago has the power to construct this public improvement and pay for it by the proceeds of general taxation, according to the steps and procedure herein outlined.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Photographic Copy of Assessment Rolls.

January 16, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

We are in receipt of your letter of recent date in which you inform us that assessment rolls and court orders in relation thereto are now being supplied to you with orders of the court attached thereto in the form of photographic copies. You ask whether it is right for you to accept them in this form.

The writer examined one of the assessment rolls you speak of and found nothing objectionable in the form of same.

The statute (Section 61 of Local Improvement Act) requires the clerk of the court to certify the roll and all orders of the judge thereon, including orders for reductions, to the officer of the City authorized to collect the assessment.

It was the practice heretofore to show the orders of court in the form of carbon copies with the original signature of the judge thereon. There is, however, nothing in the statute which requires certification by the judge or which requires that his sign manual appears on the roll that is certified by the clerk, or that requires the judge's sign manual on the reduction orders whether or not they are attached to the roll.

The documents you speak of are certified by the clerk of the court, and that meets the requirements of the statute.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Cold Storage Warehouse Inspection Fee—Power of City to Regulate in Addition to State Regulation.

January 17, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You turned over to us copy of a warrant for collection against the Chicago Cold Storage Company (F2031—September 21, 1923) for the sum of \$157 for inspection fee, with the statement that this company claims it is not liable for this inspection fee because the State also exacts an inspection fee. You ask to be advised whether this item is collectible.

The point made is to the effect that there is something unconstitutional about imposing an inspection fee by the City when the statute relating to cold storage warehouses authorizes inspection by the State Department of Agriculture. It is based on the theory very often advanced, for which there appears to be no authority, that because the State has exercised certain police powers with regard to a given subject, the City must keep its hands off.

We see nothing which precludes the City from passing ordinances providing for inspection of cold storage warehouses in the Uniform Cold Storage Act now in force in this state. (See Smith-Hurd Statutes, 1923, p. 1070.)

The rule often announced in this State is that a municipality may pass laws involving the same subject-matter as a statute if they do not conflict with the statute.

City of Chicago v. Union Ice Cream Mfg. Co., 252 Ill. 311.

City of Decatur v. Schlick, 269 Ill. 181.

City of Lewiston v. Harrison, 282 Ill. 461.

So well is this rule established that the Legislature, when it desires to prevent additional restrictions by the local au-

thorities, makes a provision to that effect in the law. A notable example of this will be found in the Motor Vehicle Act.

In addition to the numerous opinions where this principle is upheld, our Supreme Court has specifically stated that the police powers may be divided so that one law-making body may pass some laws regarding a subject, while the remainder of the power is committed to other officers.

"And again, in *The People v. Shepherd*, 36 N. Y. 285, it was held the legislature has authority to arrange the distribution of police powers, 'as the public exigencies may require; apportioning them to local jurisdictions to such extent as the law-making power deems appropriate, and committing the exercise of the residue to officers appointed as it may see fit to ordain.' See also, *People v. Pinckney et al.*, 32 N. Y. 377.

Analogous principles have been recognized by this court in *Bush v. Shipman*, 4 Scammon, 186; *Trustees, etc. v. Tatman*, 13 Ill. 27; *County of Richland v. County of Lawrence*, 12 id. 1."

People v. Harper, 91 Ill. 357-368.

In the present instance the state law provides for a license fee of \$25 per annum, and authorizes the Department of Agriculture to make inspections. It does not, however, limit the police powers of the City, and it does not require periodical inspections nor does it fix an annual or periodical inspection fee. Hence, under our interpretation of it, there is nothing that interferes with the City's right to enforce its ordinances requiring inspection and the payment of an annual fee.

We therefore recommend that you press the claim of the City, and if necessary to send it to the Law Department for collection, suit will be instituted. The amount involved is small, but the principle involved is important and should not be waived.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Submission of Bids for Man-hole Covers, One Type of Which is Patented.

January 18, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter concerning the letting of contract for manhole covers. You also forwarded to us some correspondence relating thereto and the bids and tabulation sheets involved.

It appears from the data at hand that you advertised for and obtained bids on 100 tons of manhole covers or catch basin curbs and lids, in the alternative, so that it was possible to bid on a patented article as one of the things specified. When the bids were opened there was a protest on the part of one of the bidders on the standard or unpatented covers. A letter was sent to you by a well known law firm claiming that you could not award the contract to the bidder who desires to furnish the patented article, but that on the other hand, notwithstanding the cutting out of the bid on that article, you were in a position to award the contract to the lowest bidder on the unpatented article.

The point made is that you had no authority to secure bids for a patented article under the law passed in 1919 which appears as Paragraph 227 in the chapter on Roads and Bridges in Cahill's Revised Statutes for 1923. It is admitted that if this act were applicable you proceeded properly, but it is claimed that the use of patented articles is authorized only in "constructing or maintaining any proposed public highway, road or street or section thereof," and that laying in a stock for the purposes of the Water Pipe Extension Division is not within the purview of the statute.

While the point is called to your attention that the lowest bidder on the unpatented article offered a lower figure than

the bidder for the patented article, it is not seriously contended that the slight difference in price would prevent you from letting a contract for the patented article merely because the price is slightly higher. That is entirely within your discretion, and if you are convinced that the patented article is better for the City the difference in price is not sufficient to interfere with the awarding of the contract for the better article.

As to the main point urged, we cannot agree with the view expressed on this subject in the letter referred to. It is urged that, because some of these covers are used in the parkway instead of in the roadway of streets, therefore this is not a contract for materials used for maintenance of streets. In answer to that we would say that the act is broad enough to include the maintenance of any public highway, which means the whole of it, including even the sidewalks.

The act in question has been held constitutional (*City of Rockford v. Schultz*, 296 Ill. 254), and the attitude of the Supreme Court concerning the desirability of securing such competition as is possible thereunder was manifested long before the act was passed (*Fishburn v. City of Chicago*, 171 Ill. 338). We have no doubt that the courts would hold that it is applicable in the case of the contract you are about to award.

We therefore beg to advise you that you will be within your rights if you accept the bid for the patented article under the circumstances you state if in your judgment it will give the City better service than the standard unpatented manhole.

We return the papers you forwarded to us herewith.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Right of City to Dedicate Street Through Property
Which It Owns and Through Which a Railroad
Has Condemned a Right of Way.**

January 18, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your communication of October 31, 1923, requesting to be advised as to the City's right to dedicate for the purposes of a street, a strip of land 100 feet wide, being Harlem avenue produced through the Gage Farm. A strip of land 40 feet wide, lying in the center of this proposed 100 feet strip, was condemned by a railroad for a right of way and possession taken on April 20, 1897.

The east half of this proposed 100 feet strip of land lies in the Village of Berwyn, and the west half lies in the Town of Proviso.

The City, if it deem it advisable, has the right to pass an ordinance dedicating a strip of land for a street or public highway through the Gage Farm property that it owns. The mere fact that a suburban railroad has condemned a right of way over a certain part of this proposed strip does not of itself preclude a dedication of said condemned strip of land, together with an additional strip, to the public for street purposes. The public will accept such dedication subject to the easement that the railroad company has previously obtained.

We are returning herewith the plat of survey of the property in question. We will prepare the proper ordinance on request.

Yours truly,

FRANK T. HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Form of Permit to Illinois Central R. R. Co. for Work
on E. 71st Street.**

January 18, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You forwarded to us copy of permit which you issued on November 23, 1923, to the Illinois Central Railroad Co. and its subsidiaries, for the purpose of enabling them to make some changes on East 71st street in compliance with the requirements of the Lake Front Improvement Ordinance passed July 21, 1919, as amended. Along with this copy you sent a draft of a proposed permit which the Railroad Company would like in place of the one you issued, since objection is made to some things in the permit as granted.

The general scope of the improvement for which a permit is applied for is the relocation of crossing gate towers and the erection of barriers along the street so as to provide for only one crossing at each street. The barriers are made necessary on account of the jogs in the streets which would lead to double roadways in a number of cases and endanger the safety of the public.

The objections raised to the form of the permit in most instances involve no right of the City and we recommend that all except one be met by conceding the change. The objections and our attitude concerning them are as follows:

1. The permit includes Railroad avenue along with East 71st street in two places. The company's attorneys say that nothing is asked for Railroad avenue or granted in the permit, and that there is no occasion whatever for mentioning that street. It is said that the tracks in Railroad avenue are on the private right of way of the company, which existed before the street was there, and that the City's streets are two strips, one on each side of the right of way. An exam-

ination of the City's maps seems to indicate that this is correct. We do not see any purpose in mentioning Railroad avenue in the permit, and we therefore recommend that it be eliminated.

2. In two places the permit is for "crossing gates, fences," which the company wants changed to "crossing gate towers," and in another place it wants "crossing gate towers or" inserted in front of "gatemen's houses." We see no objection to making these changes.

3. The permit provides that these structures shall be removed on demand of the commissioner of public works, which the company objects to because it might then be subject to the whim of some commissioner whose interpretation of the permit would lead him to think he had arbitrary authority. It was stated to the attorney for the company that such a clause would not give the commissioner power to act in an arbitrary or unreasonable manner, but his reply was that, while he knew that was the law, it was borrowing trouble to insert such a clause without modification and it might precipitate a difference of opinion and necessitate legal proceedings to determine whether the commissioner was acting arbitrarily or not. In our opinion the insertion of the words "whenever the same shall interfere with other public street uses" states the power of the commissioner in the premises, which power would not be amplified if the words were left out, and therefore we believe it would be proper to accede to the company's request on this point.

4. The permit provides that the issuance of same and the prosecution of the work shall in no way prejudice any rights which the City of Chicago "may possess or acquire" in East 71st street. Objection was made to this and the company wanted the wording to be changed to "may possess or have acquired," thus putting the reservation on the basis of rights acquired in the past. This we would not concede, because if by any chance the City should acquire some right in the future that would be affected by these structures, it should be in a position to assert it. The company's attorney

was notified that we would insist on this point, and, after consultation with his clients, notified the writer by telephone that he would accept this reservation as we want it. We suggest that you make the permit read "rights which the City of Chicago may possess or may acquire along East 71st street."

From the above you will be able to gather our views, but in order that there may be no mistake about it we have caused the permit as we recommend it to be re-written. We forward this draft, together with the other two drafts and the maps, herewith.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right of Widow Drawing Pension Under Police Pension Act to Recover Additional Pension on Account of Minor Children for a Period Prior to the Amendatory Act of 1917.

January 22, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

You referred to me the letter of Mr. A. B. O'Connor, 2248 Leland avenue, Chicago, Illinois, relative to the pension heretofore paid Mrs. Katherine Archibald, and the right of her daughter Mary to now be paid the pension. The letter of Mr. O'Connor states that Patrick Archibald, a policeman, died in 1893, and that his widow, Kate Archibald, has been the recipient of a widow's pension since that date. Upon the letter of Mr. O'Connor appears a memorandum to the effect that Kate Archibald, 4721 North Paulina street,

Chicago, was receiving \$50 per month; that she died December 31, 1923, and that the last check sent her was for the month of December, 1923.

Patrick Archibald having died in 1893, the status of his widow was fixed by the Act of 1887, as thereafter amended, and I assume that the pension of \$50 per month was paid to her in accordance with the provisions of Section 6 of the Act of 1887.

Mr. O'Connor's letter gives the names and ages of the children of Patrick Archibald and Kate Archibald, his wife, from which it appears that the youngest child was born September 22, 1890, and therefore was eighteen (18) years of age on September 22, 1908.

There was no provision in any Police Pension Act, applicable to the City of Chicago, granting an allotment to a widow of a deceased policeman, for or on behalf of any of his children under eighteen (18) years of age, until July 1, 1917, at which time there came into force and effect a certain amendment to the Pension Fund Act of 1915. At that time there was no child of Patrick Archibald under the age of eighteen (18) years, so that the claim that Mrs. Archibald was entitled to \$7,200 for the children is without legal foundation.

As to the claim for pension on behalf of her daughter, Mary, the letter states that Mary is now almost 32 years old; that she was entirely dependent upon her mother and is suffering from a mild mental disorder. There is no provision in the present act covering a case of this kind.

I am of the opinion, under the law as applied to the facts in this case, that the rights of any member of the family of Patrick Archibald terminated with the death of his widow.

I am returning the letter of Mr. O'Connor.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Exemption of Certain Hospitals, Universities and Charities from Payment of Water Rates.

January 22, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your request for an opinion from the Corporation Counsel, as to whether the Michael Reese Hospital, The Chicago Lying-In Hospital, The Presbyterian Hospital, The Associated Jewish Charities Workshop, The 33d Division Illinois National Guard, 115-23 East Ontario street, The 132d Infantry Armory, 2667 West Madison street and The University of Illinois School of Pharmacy, are entitled to exemption of water rates under Section 4128 of the Chicago Municipal Code of 1922.

Section 4128 of the Chicago Municipal Code of 1922 provides as follows:

“4128. (Property that may be exempted from payment of water rates.) The commissioner of public works may exempt from the payment of water rates property herein enumerated as follows:

(a) Such property as is used in the immediate conduct or carrying out of the purposes of any charitable, religious or educational institutions, if application be made for such exemption to the commissioner of public works in the form prescribed by him, and if it shall appear to the satisfaction of said commissioner that such property is not used for gain or profit, or rented, conducted, operated or maintained for the purpose of producing revenue. As a prerequisite for the granting of such exemption, the commissioner of public works shall upon demand be provided with access to the financial records of such institution. Nothing contained in this paragraph shall be held to exempt property of the United States of America, of the State of Illinois, or of any of its political subdivisions except as hereinafter mentioned.

(b) Such property of the State of Illinois as is used for an armory by the state or Federalized National Guard.

(c) All property owned or leased by the City of Chicago, unless said city either as lessee or lessor shall enter into an agreement for the payment of rates by the other party.

(d) Such property as the City Council has heretofore or may hereafter specifically exempt.

Accounts against the property of any institution exempted under the provisions of this section shall be kept in the usual manner. During each year the amount of such account shall be transmitted to the chief water assessor, who shall cause an inspection of the premises, and when said assessor shall certify that such premises has been exempted under the provisions of this section from the payment of rates and charges, such amount shall be cancelled, and a record of each institution and the amount so cancelled, shall be kept in a book provided for that purpose.

The accounts of the department of public works shall show the amounts so cancelled as a credit to the total collections and as a debit to the institutions specified."

We assume that the Michael Reese Hospital, The Chicago Lying-In Hospital, The Presbyterian Hospital and the Associated Jewish Charities Workshop are claiming exemption from the payment of water rates on the ground that they are charitable institutions.

The application of the Michael Reese Hospital for exemption from water rates, under date of January 4, 1924, shows that the institution was incorporated "not for profit" in 1879; that it is not used for gain or profit; that it is not rented, conducted or operated for the purpose of producing revenue; that about 45 per cent of services rendered is absolutely free and about 17½ per cent was at a nominal charge of \$2 per day while the cost is \$5.68 per day; that the expenditure for operation and maintenance for the year 1922, was \$640,580.02 and the income from patients was \$357,573.25 and the deficiency amounting to \$283,006.77 was received exclusively from charitable contributions.

The application of The Chicago Lying-In Hospital and Dispensary, 5042-4 Vincennes avenue, under date of Decem-

ber 18, 1915, shows that the institution was incorporated in January, 1897, that it has no capital stock; that the building is used for a maternity hospital; that the funds for the maintenance of the institution are derived partly from patients' fees, annual memberships and other subscriptions; that it is not used for profit; that 26 per cent of the work performed is charitable.

The application of Chicago Lying-In Hospital and Dispensary, 829 Maxwell street (1336 Newberry avenue), under date of May 4, 1914, shows that the institution was incorporated (date of incorporation not given); that it has no capital stock; that the building is used as a dispensary; that the funds for the maintenance of the institution are derived from charitable donations and membership; that the institution is not used for profit; that 86 per cent of the work performed is charitable.

The application of Chicago Lying-In Hospital and Dispensary, 5916-18 Vincennes avenue, under date of August 6, 1921, shows that the institution was incorporated (date of incorporation not given), that it has no capital stock; that the building is used for a Nurses' Home; that the funds for the institution are derived from subscriptions and fees from private room patients; that the institution is not used for profit; that the percentage of charitable work performed 10 per cent free and 58 per cent part pay.

Three applications of The Presbyterian Hospital of the City of Chicago, under date of December 31, 1913, shows that the institution was incorporated (date of incorporation not given); that it has no capital stock; that the buildings are used for the care of the sick and injured; that the funds for the maintenance of the institution are derived from interest on endowment fund, donations from churches, and individuals and patients; that the institution is not used for profit; that 33 per cent of the work performed is free and 42 per cent partly paid.

The application of The Associated Jewish Charities Workshop, 554 West 12th place, under date of December 19,

1923, shows that the institution was incorporated under the name of "The Jewish Service Bureau of Chicago" (date of incorporation not given); that the building is occupied by the Industrial Workshops; that the funds for the maintenance of the institution are derived from the Associated Jewish Charities of Chicago; that the institution is not conducted for the purpose of producing revenue or making profit; that all of the work performed is charitable.

In *The Congregational Sunday School and Publishing Society, Appellant v. Board of Review, Appellee*, 290 Ill. 108, our Supreme Court said, on page 113:

"Charity, in the legal sense, is not confined to mere alms-giving or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man. A charity is a gift to the general public use which extends to the rich as well as to the poor. The test of a charity and the test of a charitable organization are in law the same. The principal and distinctive features of a charitable organization are, that it has no capital stock and no provision for making dividends or profits but derives its funds mainly from public and private charity and holds them in trust for the objects and purposes expressed in its charter. In other words, the test whether an enterprise is charitable is whether it exists to carry out a purpose recognized in law as charitable or whether it is maintained for gain, profit or private advantage. An institution does not lose its charitable character, and consequent exemption from taxation, by reason of the fact that those recipients of its benefits who are able to pay are required to do so, where no profit is made by the institution and the amounts so received are applied in furthering its charitable purposes and those benefits are refused to none on account of inability to pay therefor. The fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them, and a consequent relief, to some extent, of the burden upon the State to care for and advance the interests of its citizens."

The court further says in the same case on page 122:

"In *Sisters of St. Francis v. Board of Review*, 231 Ill. 317, we held that the St. Francis Hospital was an in-

stitution of public charity where persons who are without money or property are cared for without charge and that it did not lose its right to exemption from taxation by reason of the fact that the patients received by it who are able to pay are required to do so, or by reason of the fact that it receives contributions from outside sources, so long as all the money received by it is devoted to the general purposes of charity and no portion of the money received by it is permitted to inure to the benefit of any private individual engaged in managing the charity. We further held it was no objection because far the greater number of patients paid for the care and attention they received at the institution. So long as charity was dispensed to all those who needed and applied for it, and so long as no private gain or profit came to any person connected with the institution, and so long as it did not appear that any obstacle of any character was by the corporation placed in the way of those who might need charity of the kind dispensed by the institution, the institution was a charitable and beneficent organization.

We recognized the rule adopted by this court that statutes for the exemption of property from taxation are to be strictly construed against the exemption and in favor of the State and taxation. (*First Congregational Church v. Board of Review*, 254 Ill. 220; *Northwestern University v. Hanberg*, 237 *id.* 185; *In re Walker*, 200 *id.* 566.) On the other hand, charities have always been favored in the law because they relieve the burdens of government, and if appellant fairly comes within the terms of the exemption clauses of our Revenue Act we feel inclined to grant the exemption."

From the application for exemption of water rates by the Michael Reese Hospital, The Chicago Lying-In Hospital and Dispensary, The Presbyterian Hospital and the Associated Jewish Charities Workshop, that have been submitted to us for examination, and that are hereinabove referred to and from the foregoing cases and language of our Supreme Court, we are of the opinion that said institutions are organized for charitable and beneficent purposes and should be granted exemption from the payment of water rates under Section 4128 of the Chicago Municipal Code of 1922.

The application of The 33d Division Illinois National Guard, 115-23 East Ontario street, for exemption from water rates under date of October 19, 1923, shows that it is "An activity of the State of Illinois"; that the building is occupied by The 33d Division Illinois National Guard; that the funds for the maintenance of the institution are derived from an appropriation by the General Assembly of the State of Illinois; that the institution is not used for profit. In answer to the question in application "what percentage of work performed is charitable?" we find, "All public Military service."

The application of the 132d Infantry, 33d Division, 2667 West Madison street (without date and without the affidavit of taxpayers), shows that it is incorporated (date of incorporation not given); that the building is used for military purposes; that it is not used for profit; that all of the work performed is charitable and it is maintained by the State.

We are of the opinion that these two last mentioned institutions come within Paragraph (b) of Section 4128 of the Chicago Municipal Code of 1922, and you would be justified in granting the exemptions. We would recommend, however, that The 132d Infantry be required to furnish you with a new and more definite application.

The application of the University of Illinois, School of Pharmacy, 701-07 South Wood street, for exemption from water rates (without date), shows that it is incorporated as a part of the University of Illinois; that it has no capital stock; that the building is used exclusively for school purposes; that the funds for the maintenance of the institution are derived from State appropriations; that the institution is not used for profit; that the tuition is small but not free.

We desire to call your attention to the case of *The City of Chicago et al. v. The University of Chicago*, 228 Ill. 605. The Superintendent of Water of the City of Chicago having threatened to cut off the water supply from the buildings owned by the University of Chicago for failure to pay for such water supply, the said University of Chicago filed the bill in this case in the Superior Court, for an injunction

against such action and upon hearing the relief asked was granted. The Appellate Court affirmed the decree of the Superior Court as did our Supreme Court in the above entitled case.

The court said, on pages 608 and 609:

“When the American colonies began founding universities and colleges, the first step was the erection of buildings for lodging and feeding the students while they pursued their studies under the supervision of the college authorities, and the courts have uniformly held that buildings used by colleges exclusively as dormitories and dining halls for its students, or premises occupied by the President or Professors and their families, are devoted to the purposes for which such institutions are organized. *Yale University v. New Haven*, 71 Conn. 316; *Phillips Academy v. Andover*, 175 Mass. 118; *Harvard College v. Cambridge Assessors*, 175 *id.* 145.”

The case of *Monticello Female Seminary v. People*, 106 Ill. 398, went much further. There the seminary was the owner of about seventy-five acres of land, part of which was used for gardening, part for orchard, part for raising hay, corn and oats, part for pasturage, and part by a building occupied by the superintendent of grounds and outdoor work of the seminary, and when necessary, by the students. The court said:

“The evidence further shows that all this property is necessary for the proper carrying on of the institution; that said tracts of land are used exclusively for the purposes of the institution, and that no part of the same has been leased or otherwise used with a view to profit; that it is necessary, in connection with the institution, to have cows to supply milk for the scholars and teachers, all of whom, numbering about 175 persons, reside and live within and upon the grounds of the institution; that horses are required to do the necessary hauling connected with the seminary, and that all the hay, corn and oats raised on the place go to the feeding of the stock thereon; that nothing is ever sold off the premises, and that what is raised is but a partial supply for the institution; that the object of the institution is, as far as possible, to make it a self-sustaining one, and that what

is realized over and above actual expenses is used as a fund for the education of indigent females. We do not see why the facts of this case do not bring these lands within the very words of the exemption from taxation of the constitution and the legislation upon the subject. They form one connected body of land upon which the seminary buildings are situated. They are not lands which are leased by the institution or otherwise used with a view to profit, but they are used strictly in the carrying on of this seminary of learning and are used exclusively for that purpose and we think they should be held, under the statute, to be exempt from taxation."

It is also claimed that because of the charge for room rent and for meals and for membership in the Reynolds Club the buildings are used for the purpose of producing revenue. This position is also answered by the case last cited, which holds that the property there under consideration was not used with a view to profit. The fact that students are charged tuition fees, rent for the rooms occupied and the cost of the food consumed does not affect the question. These items are all of the same character, and together constitute the charge of the university for the teaching and education of its students in its buildings and under its authority.

"The fact that certain sums are paid for the use of rooms occupied does not alter the character of the occupation. The church is none the less a church because the worshipers contribute by way of pew rent, the hospital is none the less a hospital because the beneficiaries contribute somewhat towards its maintenance, and the college is none the less a college because its beneficiaries share the cost of maintenance; and it is immaterial whether such contribution is lumped in one sum or apportioned to sources of expense, as tuition, room rent, lecture fee, dining halls, etc. (*Yale University v. New Haven, supra.*)

Accordingly it was held in that case:

"Students' fees, whether apportioned to room rent or tuition, cannot be treated as income of real estate, and that land occupied and reasonably necessary for the plant of the college is not productive real estate."

From the application of the said University of Illinois, School of Pharmacy, and the foregoing decision of our Supreme Court, we are of the opinion that the said University of Illinois School of Pharmacy, is entitled to exemption from the payment of water rates.

We most respectfully recommend that all persons and institutions claiming exemption from payment of water rates, be required to fill out and swear to the questionnaire, as prepared by the Superintendent of Water.

Very truly yours,

THOS. W. FLYNN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Duty of Chicago and Northwestern Railway Co. to
Remove Its Tracks from the South Thirty-four
Feet of the East Nine Hundred Feet of
Illinois Street Upon Sixty Days'
Notice From the City.**

January 23, 1924.

HON. JAMES B. BOWLER, Commissioner of Compensation.

Dear Sir:

In a letter dated October 4, 1923, you state that Chicago and Northwestern Railway Company is occupying with its tracks the south thirty-four feet of the east nine hundred feet of Illinois street. You ask what right the company has to occupy the street against the will of the City.

In 1913 the City began the construction of the Municipal Pier. For this purpose it was necessary to extend Indiana

and Illinois streets from Peshtigo court eastward over land owned by the Chicago Dock and Canal Company.

The Dock Company offered to sell to the City two strips of land each seventy-four by nine hundred feet for \$150,000 per strip, to be used for the extension of said streets. On July 28, 1913, the City Council of the City of Chicago accepted the offer made by the Dock Company. In the ordinance accepting the offer it was stated that the strip for extension of Illinois street was subject to the easement, if any, of the Chicago and Northwestern Railway Company to occupy that portion of the strip on which the Railway Company had then laid its tracks and the right to extend these tracks to the east end of the strip.

The Dock Company by its Board of Directors on August 6, 1913, ratified the sale of the two strips to the City of Chicago.

At the time the Illinois street strip was purchased, the Railway Company had laid down its tracks on a trifle more than one-half of said nine hundred foot strip. They were laid down by virtue of an agreement entered into between the Dock Company and the Railway Company dated June 19, 1908, in and by which the Railway Company was given permission to lay down its tracks on this strip. This instrument calls itself an easement, but it is nothing more than a revocable license to the Railway Company to lay its tracks upon the strip. The instrument contains the following clause:

“It being expressly understood by and between the parties hereto that said tracks shall or may be removed from said above described premises by said party of the second part upon the expiration of sixty days’ written notice given by either of the parties hereto to the other, and the rights herein granted are subject to this condition, and that upon such removal of said tracks all rights herein granted shall cease and determine.”

On August 9, 1913, the Railway Company surrendered the above mentioned agreement to the Dock Company, and the Dock Company and the Railway Company entered into

another agreement precisely similar to the first, except that the tracks were not to be extended over a strip one hundred feet wide east of the nine hundred foot strip the City had purchased for Illinois street. The same right to terminate the occupancy by the Railway Company on sixty days' written notice and the same right by the Railway Company to take up its tracks on like notice was reserved in the new agreement.

Subsequent to the making of this agreement, and after the strip had become a street, the Railway Company extended its tracks eastward from the middle of the strip to the full length of the nine hundred feet purchased by the City. It now, therefore, occupies the south thirty-four feet of the east nine hundred feet of Illinois street.

That the Railway Company acquired any right under the agreement of August 9, 1913, is open to question. At that time the Dock Company had parted with its title. That the Railway Company could not put tracks in a street, and this strip became a street immediately on purchase, without complying with the statute regarding frontage consents is not open to question. But the tracks are there. The instrument of August 9, 1913, on which it relies for its right to be there, provides the means by which that right may be terminated. The City succeeded to all the rights reserved to the Dock Company in that instrument.

On the City giving the Railway Company sixty days' written notice the Railway Company must remove its tracks from the south thirty-four feet of the east nine hundred feet of Illinois street.

Respectfully submitted,

DANIEL V. GALLERY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Pension Rights of Secretary to the Police Department.

January 23, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

I have had referred to me for an opinion the communication of Simon Mayer, Secretary of the Police Department, relative to the period of service credited to him for prior service on his certificate No. 2912.

Mr. Mayer states that he joined the department on July 7, 1899, was assigned to duty as Secretary of the Police Department, with the rank of Captain, and that he had served in such position continuously since his appointment with the exception of two years when he was on leave of absence without pay.

Section 12 of the Annuity and Benefit Fund Act, approved June 29, 1921, defines the word "Policeman" as follows:

"Policeman: Any person appointed and sworn or designated by law as a policeman of such city, and who has served or is serving, or shall serve in regularly constituted police department of such city as a policeman, or policewoman, or police patrol driver, or police operator, or secretary of such police department * * *," etc.

Section 49 of the Annuity and Benefit Fund Act approved June 29, 1921, provides that in the computation of the term of service rendered by any policeman prior to the 1st of January, A. D. 1922, the following periods of time should be counted in addition to all periods of time during which such policeman shall perform the duties of his position, as periods of service for annuity purposes only:

“All periods of vacation, all periods of leave of absence with whole or part pay, all periods of leave of absence without pay which were necessary on account of the disability.”

It was the evident intention of the legislature that the Annuity and Benefit Fund Act, approved June 29, 1921, should apply to the present Secretary of the Police Department, and that he should receive all of the benefits of said Act, for the reason that in defining the word “policeman” the Act specifically says that it should include anyone “who has served,” as well as anyone who is serving (*Beutel v. Foreman*, 288 Ill. 106; *People v. Abbott*, 274 Ill. 380). Mr. Mayer states that he has served as Secretary of the Police Department since July 7, 1899, excepting for the period of time he was on “leave of absence without pay”; he could not receive the benefits of this Act unless he were credited with his prior service.

I am of the opinion that Mr. Mayer should be credited on his certificate for prior service with the full period of time from July 7, 1899, excepting for the period of time he was on leave of absence without pay.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Psychopathic Laboratory—Effect of Appropriation for Same Under Caption “Municipal Court”—Status of Attorney.

January 24, 1924.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

In your letter of the 22d inst. you call attention to the appropriations for salaries and other expenses of the Psycho-

pathic Laboratory which are listed under the caption "Municipal Court" in the annual appropriation bill, and you ask whether the duties performed in the said laboratory are such as "have to do with the legal functions of the Court."

The Psychopathic Laboratory, in point of law, is not a part of or connected in any way with the Municipal Court. There is no provision of the Municipal Court Act which creates it or gives the court any jurisdiction over it. In fact there is no Act of the Legislature which specifically creates it.

Such being the case, the Psychopathic Laboratory must be regarded as an institution authorized under the various clauses of Section 1, Article V, of the Cities and Villages Act which grant the City power with respect to health matters, the establishment of hospitals, dispensaries, etc., and similar functions. As such it would not come within the control of the court, but would more properly be under the jurisdiction of the Department of Health.

On the other hand, there is no statute which requires that appropriations for an activity which is authorized under the law must be made to any particular department. If the City Council sees fit to designate some officer other than the Commissioner of Health to have control of the fund appropriated for this purpose, it may do so even though such control would naturally fall within the Department of Health. Hence, if it has been found expedient to let the Chief Justice of the Municipal Court administer this particular appropriation, there is nothing unlawful about appropriating the money in that way. Of course, it must be understood that, so far as appointment and removal of employes is concerned, and the status generally of employes appropriated for under this caption where they are not a part of the court machinery under the terms of the Municipal Court Act, they are to be regarded and treated as City employes as distinguished from Municipal Court employes even though the pay-rolls are signed by the Chief Justice on account of the appropriation having been made in this way.

In this connection it might be well to state that there is a difference in the case of any attorney who is assigned to a different department than the Department of Law. In such case the statute requires him to be under the jurisdiction of the Corporation Counsel, and it was so held in *People ex rel Ettelson v. Faherty, et al.*, 306 Ill. 119.

Very truly yours,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Police Pensioner to Recover Pension Payments When Leaving Service Without Serving Prescribed Time Under Act of 1915, Amended 1917.

January 24, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

Replying to your letter of January 16, 1924, as to the right of Hugh S. Wakefield to withdraw contributions made to the Policemen's Annuity and Benefit Fund, I submit the following:

Your letter states that the records of the Retirement Board show that Mr. Wakefield joined the Police Department on March 28, 1909, and left the service March 1, 1921, after service of nearly twelve years. In leaving the department in 1921, and prior to the passage of the present Annuity and Benefit Fund Act, the status of Mr. Wakefield is governed by the Act of 1915, as amended in 1917.

I find no provision in the Police Pension Fund Act of 1915, as amended in 1917, authorizing the refund to a member of the Police Department of any of the amounts paid into the fund by or for him.

You state in your letter that "he expressed the opinion that the City had no right to take payments from a man for twelve years and not return anything to him." During these twelve years, Mr. Wakefield, and his widow and children, if any, were insured against his death, disability in service, or insanity. Moreover, the Supreme Court of Illinois (*Pecoy v. City of Chicago*, 265 Ill. 78, 80) has held that:

"Pensions are in the nature of bounties of the government which it has the right to give, withhold, distribute or recall at its discretion. This rule is not changed by the circumstance that plaintiff in error (a policeman) claims to have contributed one per cent of his salary to such fund. The alleged contribution was not, in fact, a payment by him. He accepted the appointment of police patrolman with the knowledge that one per cent would be deducted each month and placed in the pension fund. The money was never paid to him, and the city simply transferred one per cent of the salary from one fund to another, and continued to hold it as a special fund to meet the disbursements under the Police Pension Law."

In the absence of a specific provision in the Annuity and Benefit Fund Act, permitting the withdrawal of contributions, no contributor to such pension fund has any legal right to claim or be paid any of the moneys credited to him in any pension fund established under such pension act.

I am of the opinion that Mr. Wakefield cannot, by this Board, be paid any sum out of the present pension fund on the claim presented by him.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Procedure to Close Theaters which are Dangerous and Present a Fire Hazard.

January 24, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In response to your verbal request for an opinion from the Corporation Counsel outlining the powers and duties and proper procedure to be followed by the Superintendent of Police, the chief of fire prevention and public safety and the building commissioner of the City of Chicago with relation to the violation of the fire prevention ordinances by theaters, and particularly with regard to the right of the City to close the same, we desire to submit the following:

The following sections of the Chicago Municipal Code of 1922 enjoin upon the chief of fire prevention and public safety and upon the superintendent of police, certain duties as follows:

“1276. Inspection of buildings—may require repair or alteration.

(a) The chief of fire prevention and public safety shall make or cause to be made frequent and regular inspections, with sufficient frequency to secure efficient supervision of all buildings, structures or places used either for manufacturing or commercial purposes, or occupied or frequented by large numbers of people, of all school buildings, public halls, churches, hospitals, theaters, hotels, apartment houses, and all places of amusement, recreation, or employment, for the purposes of determining the safety of the occupants of such buildings, structures or places in the event of fire, panic or accident, to examine the working order and repair of all doors, fire escapes, fire fighting appliances and devices, the condition and maintenance of exits, corridors, stairways and fire escapes and their approaches with regard to obstructions, the disposition, arrangement and protection of stock, combustible material and rubbish, heat-

ing devices and ovens, with regard to the safety from fire, the protection of hazardous machinery, appliances and apparatus, and for the purpose of ascertaining whether the several provisions of this chapter are being efficiently carried out.

(b) In case it is found that any of the said provisions of this chapter are not being complied with, or that any building, structure, or place, or its contents, or any appliance or equipment thereof is in such condition as to be the probable cause of fire or as likely to endanger life or safety in case of fire, panic or other accident, the chief of fire prevention and public safety shall give notice in writing to the owner, occupant, lessee or person in possession, charge or control of such building, structure or place, to make such changes, alterations or repairs, or to perform such work, or to take such actions as the provisions of this chapter or the safety of any person or persons in or about any such building, structure, or place in case of fire, panic or other accident, may require, within such time as shall be designated by the chief of fire prevention and public safety which shall in no event exceed fifteen days after receipt of such notice; and in case such changes, alterations, repairs or any of the requirements which are called for by said notice are not made or performed to the satisfaction of the chief of fire prevention and public safety within the time specified in said notices, he shall make returns of any violations of the several provisions of this chapter or any defaults of such notice to the department of law of the City of Chicago for prosecution.

(c) It shall be the duty of the chief of fire prevention and public safety when any citizen represents that any of the several provisions of this chapter are being violated, or that combustible materials are kept in any place in the city in any insecure manner, or that doors, stairways, corridors, exits, or fire escapes, in any factory, workshop, place of employment, amusement, education or recreation are obstructed or are in bad order or repair, or that any door or exit is kept locked or fastened during the time that such places are occupied or frequented by employes or by the public, or that any building, structure or place in the city is occupied or crowded beyond the capacity of its exits, or that the heating apparatus, appliances, or devices in any build-

ing in the city are insecure or dangerous, or that any building, structure or place in the city is being maintained in such a manner as to be a fire menace or dangerous in case of fire, panic or accident; to make an examination of such building, structure or place and if such representation is found to be true, he shall give such notice in writing as provided in the preceding paragraph. And in case the changes, alterations, repairs, or requirements ordered in such notice are not made within the time therein specified, he shall make returns of such violations of the several provisions of this chapter, or of any default of such notice, to the department of law of the City of Chicago, for prosecution.

(d) It shall be unlawful to continue the use of or to occupy any building, structure or place, which does not comply with all the provisions of this chapter until the changes, alterations, repairs, or requirements found necessary by the chief of fire prevention and public safety to bring it into compliance with the provisions of this chapter shall have been made.

1278. Duty to enforce ordinances.

(a) The chief of fire prevention and public safety shall have the power and it shall be his duty to enforce all the provisions of this chapter which may tend to prevent the starting and spreading of fires or disastrous results in case of fire and to order the discontinuance of any practice which may result in the starting or spreading of fire.

(b) Should the chief of fire prevention and public safety discover or have his attention directed to any structural instability of any building or structure, he shall take such immediate and proper action as will conserve the safety of the occupants of such building or structure and of the public and shall at once notify the commissioner of buildings and turn the matter over to him for his supervision and disposal.

1279. Power to call upon the department of police for aid. Whenever it shall be necessary, in the opinion of the chief of fire prevention and public safety to call upon the department of police for aid or assistance in carrying out or enforcing any of the provisions of this chapter, he shall have the authority so to do, and it shall be the duty of the superintendent of police, or of any member of the police force, when called upon by said chief, or his duly authorized agent, to act according to

the instructions of, and to perform such duties as may be required by him, in order to enforce or put into effect the provisions of this chapter."

1532. What constitutes a nuisance.) Any building, structure, enclosure, place or premises perilous to life or property by reason of the nature, condition or quantity of its contents or its use, or the overcrowding at any time of persons therein, or by reason of deficiencies in such fire alarm or fire prevention equipment as may be required by the provisions of this chapter, is hereby declared to be a nuisance and within the meaning of the word as used in this ordinance, and the chief of fire prevention and public safety is empowered and directed to cause any such nuisance to be abated.

An inspection of the above quoted sections of the fire prevention ordinances shows that section 1276 (d) provides when any building, structure or place does not comply with the requirements of the fire prevention ordinances, it is unlawful to continue the use of or to occupy the same until a compliance with the said ordinances has been obtained. Section 1279 of the above quoted ordinances further provides that the chief of fire prevention and public safety may call upon the superintendent of police and the department of police for aid in carrying out or enforcing any of the provisions of the said ordinances. In other words, it is prescribed that whenever a violation of the fire prevention ordinances takes place, the chief of fire prevention and public safety may stop the use or occupation of the building, structure, or place, constituting such violation, and the superintendent of police is required to aid in preventing such unlawful use.

The only question which might be raised, then, would be the question of whether the aforequoted sections of the fire prevention ordinances requiring a building which does not comply with the said ordinances to be closed, are valid ordinances which can be sustained in the courts. The legislature has expressly granted to municipalities the power summarily to abate nuisances. (Section 73 of Article V of an act to provide for the incorporation of Cities and Villages, approved April 10, 1872, in force July 1, 1872.) The valid-

ity of this grant of power has been upheld in the case of *Roberts v. Ogle*, 30 Ill. 459. Furthermore, the courts have frequently held that when buildings are erected within the city limits which constitute in fact a nuisance in that they are a menace with respect to the hazards of fire and, because of their faulty construction, may endanger the lives and safety of people within them should a fire occur, the city authorities may summarily tear them down. In such a case it is not necessary for the chief of fire prevention and for the superintendent of police to act under order of court or court authority. When a building or structure is clearly dangerous from the point of view of fire prevention, it then becomes the duty of the chief of fire prevention and of the superintendent of police to close the same to the use of the public. If the danger in the said building or structure exists in the failure of the building to provide adequate means of egress from the building in case of fire, or inadequate sprinkler systems or fire apparatus, as required by the fire prevention ordinances, the use of the building by the public should be prevented until these faults have been remedied. However, if the *construction* of the building itself constitutes the menace, for example, if a wooden building were erected within the city fire limits, then the building itself may be torn down, and this nuisance thereby summarily abated. That the city has power to proceed as above outlined, has been clearly and definitely decided by the Supreme Court of Illinois, in the case of *King v. Davenport*, 98 Ill. 305. The same question has also been passed upon in the case of *Nazworthy v. City of Sullivan*, 55 Ill. App. 48; *Meltzer v. City of Chicago*, 182 Ill. 334, and *Patterson v. Johnson*, 214 Ill. 481, 488.

The exercise of the police power for the prevention of the dangers of fire is essential to the preservation of the welfare and safety of the public. Although its application may, in practice result in hardship in certain instances, nevertheless the lives of the citizens are of paramount importance and any momentary hardship to the owner of buildings is of minor importance.

It should be noted that the city is never justified in proceeding in an unreasonable manner under its police power. If the violation of the fire prevention ordinances constitutes merely a technical violation without creating a condition which is in fact dangerous to life or property, then, the building or structure should not be arbitrarily closed, but the matter should be placed in the hands of the prosecuting attorney for the purpose of instituting suits to recover the penalty prescribed for the violations of the fire prevention ordinances. But, whenever in the opinion of the chief of fire prevention a violation of the fire prevention ordinances exists which creates a condition from which danger to life or property from fire may arise, then it is the duty of the chief of fire prevention and of the superintendent of police to stop any further use of the building by the public. This is particularly applicable where a license to operate a theatre, hospital or other similar enterprise has been revoked because of a failure to comply with fire prevention ordinances.

Respectfully submitted,

ALBERT H. VEEDER,
JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Commonwealth Edison Co. May Not Require Compensation for Removal of Poles Maintained on Alley Which Has Been Vacated.

January 24, 1924.

HON. LEO J. WINIECKE, Commissioner of Public Service.

Dear Sir:

We have your letter of the 3rd inst., concerning a request from Rev. J. J. Barthauski, 5645 S. Artesian avenue,

with reference to the refusal of the Commonwealth Edison Co. to remove their poles and wires from the alley in the block bounded by 54th and 55th streets and Talman avenue and Washtenaw avenue, unless that company is paid the cost of replacing such equipment. You ask an opinion "as to whether the Commonwealth Edison Company can request the payment or whether they are acting within their rights in this matter?" We submit the following:

A proper determination of the question depends upon a consideration of the property rights of the Commonwealth Edison Company and the owners of the lots abutting on the alley in question. The alley was vacated by ordinance passed June 22, 1914, and subsequently recorded in the Recorder's office of Cook County. The alley was originally dedicated to the city by statutory dedication. Section 3 of the Plat Act provides that the execution and recording of a plat shall be held to be a conveyance to the municipality, in fee simple, of the streets and alleys shown on the plat. The Supreme Court of this State in construing that section had held that it vested in the municipality not a fee simple title absolute, but a qualified, base, or determinable fee, which may continue forever but is determined by the vacation of the plat or the particular street or alley in question. *Prall v. Burckhardt*, 299 Ill. 19, and cases there cited. That is to say, that upon vacation, all the right, title and interest of the city in and to the vacated portion is surrendered and abandoned. A vacation is no form of a conveyance. It is a mere relinquishment or abandonment and runs to no one. As a matter of law, the city is without power or authority to convey or vacate to any one such land.

Section 2 of the Vacation Act determines who shall be the owner of a vacated street or alley, and provides that the title to such reverts to the abutting owners. This statute was held valid and constitutional in the case of *Prall v. Burckhardt*, 299 Ill. 19 (*supra*).

It being established that the title to the alley in question is vested in the abutting owners, the city is no longer a

party in interest and it remains to be considered what are the relative rights of the abutting owners and the Edison Co. The Edison Company's rights were acquired under a contract ordinance, which our Supreme Court has held gives that company merely a license to the use of the streets and alleys. The abutting owners own the disputed strip in fee simple. (Sec. 2, Ch. 145, Cahill's R. S.)

The Edison Company claims under the city and could acquire no greater rights than the city itself had. The city had a base or determinable fee in the alley, and it is the law of this state that the determinable quality of the fee of the first taker follows any transfer by him, either of the fee or of any right or interest therein. *Blackstone v. Althouse*, 278 Ill. 481; *Becker v. Becker*, 206 Ill. 531; *Williams v. Elliott*, 246 Ill. 548; *Underhill on Wills*, Sec. 507. It follows, therefore, that when the interest of the city terminated, the interest of the Edison Company, claiming under the city, also terminated, and the alley passed to the abutting owners without the burden of a lien of any right or interest of that company. The maintenance of poles and wires in the strip, formerly an alley, is, therefore, a trespass and such equipment is unlawfully there maintained. It is a necessary consequence of this conclusion that the abutting owners are not properly chargeable with the cost of replacing or removing the poles.

The city is not a proper party to any controversy that may arise concerning this matter, nevertheless we are glad to be of service to your office and furnish the requested information.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Certain Items Which Should Be Included Within Term
"Gross Receipts" as Used in Ordinance of the
Northwestern Elevated Railroad Co.**

January 25, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We beg leave herein to reply to your communication in respect to additional compensation from the Northwestern Elevated Railroad Company. Specifically your question is whether the Company's statements of gross receipts on which the City's right to compensation is based should include receipts from the following items: (1) sale of scrap material—waste paper and junk; (2) rent of loop subways, by which we understand you to mean the structures at various stations in the "Union Loop," providing a passageway under the elevated tracks; (3) proportion of telephone receipts from public telephone booths; (4) advertising and station concessions; and (5) rentals received from the Chicago North Shore and Milwaukee Railroad Company for trackage privileges and other services. Items one to four inclusive are so different in nature from the fifth item that we will discuss only the first four items in this opinion and make the questions raised by the fifth item the subject of a subsequent report. Since the Northwestern Elevated Railroad Company pays compensation based on the revenues of its "Main Line" under an ordinance passed January 8, 1894, and compensation on the revenues of the "Union Loop" under an agreement made July 6, 1896, between the City of Chicago and the Union Elevated Railroad Company and Union Consolidated Elevated Railway Company, it will be necessary to consider the above mentioned items in relation to both the ordinance and the contract.

ORDINANCE OF JANUARY 8, 1894.

Section 13 of the Ordinance of January 8, 1894, contains the following language:

“* * * After the expiration of ten (10) years from and after the commencement of the operation of the elevated railroad hereby authorized, or some part thereof, said company shall pay in to the treasury of the City of Chicago, annually, a *percentage of its gross receipts from the operation of said road and branches*, as compensation for the benefits conferred by this ordinance upon said company, as follows: One per cent for a period of ten years; two per cent for the following period of ten years, and three per cent for the remainder of the fifty years for which this franchise is granted.” (Italics ours.)

The question is, therefore, whether the items listed above are “*gross receipts from the operation of said road and branches*” within the meaning of the ordinance. The term “*operation*” is defined in 29 Cyc. 1497, to mean “The exertion of power, physical, mechanical, or moral—action, as of an army or fleet—process of operating; mode of action; an effect brought about in accordance with a definite plan. In *Portage Lake Bridge Company v. Wright*, 78 Mich. 426, a contract to “*operate and manage*” a drawbridge was held to mean the opening and closing of the bridge. Similar interpretations of the term “*operation*” are found in *Callahan v. St. Louis Merchant's Bridge Terminal Railroad Company*, 71 S. W. 208; *Larson v. Illinois Central Railroad Company*, 58 N. W. 1076; *Cumming v. Brooklyn City Railroad Company*, 10 N. E. 855; *Perez v. San Antonio and A. P. Ry. Co.*, 67 S. W. 137.

We are of the opinion, therefore, that the phrase “*operation of said road and branches*” as used in the ordinance means the use of said road for the purpose of transportation or, in other words, the use of its properties and facilities for public service as a railroad carrier. The phrase “*gross receipts from the operation of said road and branches*” would

include all revenues derived from services rendered or transportation facilities made useful to the public, *but would not include items of income from other sources merely incidental to the Company's business.*

In *State v. Minnesota and International Railway Company*, 118 N. W. 679, a statute imposed upon railway companies a tax of three per cent of "gross earnings." The court discussed the sources of such "gross earnings" within the meaning of the statute in the following language (p. 680):

"* * * The operation of a railroad is not necessarily restricted to operating trains upon railway tracks. We believe it to have been the purpose of the Legislature to require railroad companies to pay into the state treasury the stated percentage of the amount of earnings received in connection with all operations reasonably within the powers conferred upon them by the corporate acts. Such companies are organized and conducted primarily for transportation purposes, but they receive a considerable income from other sources incidental to the transportation business, though not directly from the operation of trains. We believe the proper meaning of the act under consideration to be that, when a railroad company is engaged in work reasonably within its charter powers, the receipts from such sources constitute gross earnings in the operation of the railroad."

Applying the doctrine stated, however, to certain contested items of income similar in character to those under discussion here, the court said (p. 681):

5. "A considerable amount of money was received from the sale of material, supplies, and equipment sold to other railway companies and other parties. (Items 2 and 3.) These items do not constitute income, or earnings, in the operation of the railroad. The buying and selling of railroad supplies was not a part of the company's legitimate business, and it will not be presumed that the company was engaged in that business. *It fairly appears from the exhibits that the material referred to in these items consisted of old or worn-out cars and appliances, or of a surplus of equipment which the company had no further use for, and they should not be charged with the amount of money received in disposing of that*

class of material when the necessities of the business required them to constantly provide new equipment." (Italics ours.)

7. "Under the head of income other than from operation, the amount of \$18,115.84 was received from interest or exchange from moneys deposited in banks located in the State of Minnesota, and also interest on securities owned by the company, and the sum of \$12,070.49 was *received from the leasing of property on the company's right of way, garnishee fees, commissions from insurance companies, receipts received from rental of telephone companies over the right of way, billboards, sale of hay, stumpage, etc.* (Items 14 and 15.) *We are not disposed to consider receipts of this character as a part of the gross earnings.*" (Italics ours.)

In *State v. Illinois Central Railroad Company*, 246 Ill. 188, the company was obligated by the terms of its special act or charter to pay into the treasury of the State of Illinois, seven per cent of its gross proceeds variously referred to in the act as "gross receipts" and "gross earnings." The court, after holding that the terms "gross receipts" and "gross earnings" were synonymous, held that moneys derived from eating houses, maintained by the Railroad Company for the accommodation of its passengers at places where such accommodations would otherwise be lacking and money paid by express companies for transportation services were part of such gross receipts but that interest on deposits was not part of the gross earnings of the road although the money deposited had been received for transportation services.

We are of the opinion, therefore, that moneys arising from said items one to four, inclusive, are not part of the "gross receipts from the operation of said road and branches" within the meaning of the Ordinance of January 8, 1894, and the City is not, under that ordinance, entitled to compensation thereon.

UNION LOOP CONTRACT.

The contract of July 6, 1896, between the City of Chicago and the Union Elevated Railroad Company and Union

Consolidated Elevated Railway Company contains the following language in respect to compensation to be paid to the City of Chicago.

“* * * Said railroad companies and their respective successors and assigns, and whoever shall control and operate the said loop line, or be in receipt of or be entitled to receive the tolls, income, rents, issues and profits thereof, shall pay to said city, semi-annually, on the first days of August and of February in each year during the term of said ordinance after the year 1896, in addition to any and all payments expressly by said ordinance or by any other ordinance of said city required, a proportionate amount as hereinafter stated of such tolls, income, rents, issues and profits, after making a deduction therefrom at the rate of two hundred and fifty thousand (\$250,000) dollars a year on account of the interest charge against said loop line, before computing said proportionate amount. * * *”

“* * * Fourth. On such gross receipts during 1917, the fifteen (15) year period from January 1st to December 31st, 1931, both inclusive, the percentage shall be twenty (20) per centum per annum. * * *”

Said contract was made in consideration of the passage of an ordinance of June 29, 1896, permitting the Union Consolidated Elevated Railway Company to construct the Van Buren street side of the “Union Loop.” The contract when read in connection with the ordinance contemplates the operation of the “Union Loop” (although its different sides were constructed by different companies) by the Union Elevated Railroad Company, whose rights have passed to the Northwestern Elevated Railroad Company, and the joint use of the structures of the “Union Loop” by the Northwestern Elevated Railroad Company, Lake Street Elevated Railroad Company (now Chicago and Oak Park Elevated Railway Company), Chicago and South Side Rapid Transit Railroad Company (whose rights have passed to the South Side Elevated Railroad Company) and the Metropolitan West Side Elevated Railway Company. The revenues of said Union Elevated Railroad Company were to be derived chiefly, if not wholly, from payments made by the other companies for

the right to use the structures of the "Union Loop." We are of the opinion therefore that the terms "tolls, income, rents, issues and profits," as used in said contract of July 6, 1896, mean the receipts from the operation of the line for the furnishing of transportation facilities and transportation service and what we have said above about items of income arising from other sources is also applicable to payments due under this contract.

Respectfully submitted,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH, .

Corporation Counsel.

**Justice of Peace Outside Chicago Has No Authority
to Issue Warrant for Search of Premises
Located Within the City Limits.**

January 26, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your request to the Corporation Counsel for an opinion as to the validity of a search warrant issued by Daniel M. Mickey, justice of the peace in Wilmette, Illinois, commanding the Superintendent of Police of Chicago to search the premises located on Clark street near Devon avenue in the City of Chicago. This warrant is void in that a Justice of the Peace of that part of Cook County located outside of the territorial limits of the City of Chicago has no authority to issue process within the City of Chicago,

and has no jurisdiction over any territory located within the city limits.

Section 60 of "An Act in relation to a Municipal Court in the City of Chicago," approved May 18, 1905, adopted November 7, 1905, provides as follows:

"Sec. 60. That the offices of Justices of the Peace, police magistrates, and constables in and for the City of Chicago be and they are hereby abolished, and that the jurisdiction of Justices of the Peace in the territory of the County of Cook outside of the City of Chicago be and it is hereby limited to the territory of said county outside of said city, * * * and no other court than a court of record shall exercise jurisdiction in any case in which said Municipal Court is given jurisdiction by this Act." (As amended by Act approved June 3, 1907, adopted at election held September 17, 1907.)

Therefore we desire to advise you that the above mentioned warrant is void in that the Justice of the Peace at Wilmette, Illinois, had no authority to issue a search warrant authorizing premises to be searched which are located within the limits of the City of Chicago. Since this warrant is void, it confers no authority upon you to search the premises therein described, and should you do so, you might be liable to a damage suit.

As a matter of courtesy, it is suggested that this warrant be returned to the Justice of the Peace who issued it, together with a copy of this communication.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved: .

FRANCIS X. BUSCH,

Corporation Counsel.

**Decree Establishing Rights of City in Streets in
Territory Known as "Canalport."**

January 26, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You have requested the Corporation Counsel for an opinion relative to the effect of the decree entered by the Circuit Court of Cook County in the case of Chauncey J. Jones *et al.* v. Agee, burnt record No. 1640, with respect to the streets and alleys in the territory known as "Canalport," and also whether the said decree is final.

The decree in the above entitled cause was entered December 24, 1920. On page 154 of the printed decree appears the following:

"It is, therefore, further ordered, adjudged and decreed that an easement for all the uses of a public street be and the same is hereby established in the City of Chicago in that strip of ground sixty-six feet wide shown on the plat of Canalport as lying between the west lines of said blocks 89, 103, 104, and 114 and the east lines of said blocks 90, 102, 105 and 113 in Canalport known as May street and in that strip of ground sixty-six feet wide shown on the plat of Canalport as lying between the west line of blocks 101, 106, 112, 116 and the east line of blocks 100, 107, 111 and 117 in Canalport and known as Robinson street, against the petitioners and against all other defendants herein."

The rights of the City of Chicago in the above described strips of land consist of easements to use the said strips as public streets. The City does not own the fee in the above described strips of land because the original dedication of said streets was by a plat which did not conform to the statutory requirements, and consequently the dedication thereof was a common law dedication.

The above mentioned decree is now final, in that the time allowed by the statute in which to appeal or sue out a writ of error has now expired without any such appeal or writ of error having been prayed or sued out.

If the foregoing information is not sufficient for your purposes, the writer will be glad to confer with you and furnish any additional information which may be required.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Expenditures from Vehicle Tax Fund.

January 29, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You forwarded to this department a resolution presented to the City Council on January 2, 1924, and now pending before your committee (see Council Journal, p. 1525), concerning the use to be made of the Vehicle Tax Fund. The resolution in substance states that it is an improper use of the wheel tax money to expend it on other streets than those paved with asphalt or equally good pavement, and commits the City Council to that policy. You ask in this connection for an opinion as to the rights and obligations of the City in the expenditure of the Vehicle Tax Fund.

The authority to collect a vehicle tax is given by Clause 96 of Section 1, Article V, of the Cities and Villages Act, which reads as follows:

“Ninety-sixth—To direct, license and control all wagons and other vehicles conveying loads within the

city, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expenses of street or alley improvement or repair."

You will observe that this is an enabling provision, which authorizes among other things, the collection of a license fee, on which there is no limit placed, and which is subject only to one restriction, viz., that it is to be kept in a separate fund and used only for the cost and expense of street and alley improvement or repair. There is no further restriction as to its use than is contained in these words, and therefore it cannot be said that it would be improper to use it for any kind of paving, improvement or repair of street or alley that the City Council sees fit to designate.

In fact, when it is remembered that this tax is collected partly from horse-drawn vehicles which are often compelled to use very poorly conditioned streets and alleys, there seems to be good reason for expending at least a part of the fund on such poorer streets as are seldom used by automobiles, although this is entirely within the discretion of the City Council.

When the Motor Vehicle Act of 1919 was passed, it contained the provision (Section 26) which had been in force since 1915 under which there was a limitation placed on the amount which may be collected as a vehicle tax by cities and villages on certain classes of motor vehicles. While this is purely and simply a limitation and is not an enabling act authorizing the collection of a license, it seems to have been assumed that the tax so limited would be levied, and the following provision was "hitched on," so to speak, in order that the safeguard already placed on the Vehicle Tax Fund would be additionally fortified:

"The proceeds of all fees so collected by any city, town or village shall be used for the purpose of improving, paving, repairing or maintaining the streets and other public roadways within such city, town or village and shall never be devoted to any other use whatever:

Provided, that the actual cost of the collection of such fees and the disbursement thereof may be deducted from the total amount collected."

While the wording in the clause last quoted is somewhat different from the wording in the Cities and Villages Act, the import of the language is practically the same—so much so that we are unable to point out any difference.

From the above it should be clear that the rights of the City Council in the expenditure of the fund in question are subject to only the one limitation that the expenditures must be for the improvement, repair or maintenance of streets and alleys.

We return the resolution above referred to herewith.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

When Police Pensioner is Entitled to Refund of Payments Into Pension Fund on Leaving Service.

January 29, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

Replying to your letter of January 24, 1924, relative to the right of Raymond C. Colson, 1921 Nebraska avenue, to a refund of all or part of his salary deductions from May 7, 1917, to July 14, 1922, I submit the following:

The only provision in any pension act applicable to the City of Chicago, which confers a right to any pension fund contributor to a refund in case of resignation or discharge, is Section 39 of the Policemen's Annuity and Benefit Fund Act approved June 29, 1921. Reference to that section will show that any "present employe policeman," without regard to the period of time he shall have served, who shall resign or be discharged from the service after January 1, 1922, and before he shall become fifty (50) years of age or who, having served less than ten years, shall resign or be discharged after January 1, 1922, and before he shall have become fifty-seven (57) years of age "Shall have a right to have refunded to him the entire amount which shall have accumulated to his credit for age and service annuity and widow's annuity purposes on the date of such resignation or discharge from the service from amounts deducted from his salary in accordance with the provisions of this act." If Mr. Colson has not become fifty-seven (57) years of age, he is entitled to have refunded to him the amounts deducted from his salary for age and service annuity and widow's annuity purposes from January 1, 1922, to July 14, 1922, so far as the same were deducted in accordance with the provisions of the Police Pension Fund Act.

For the reasons set out in the opinion in the case of Hugh S. Wakefield, heretofore submitted to you, and to which reference is hereby made, I am of the opinion that Mr. Colson is not entitled to have refunded to him any contributions credited to him prior to January 1, 1922.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Effect of Amendatory Act of 1917 on Provisions of
Police Pension Fund Act Relative to Pay-
ments on Account of Minor Children.**

January 29, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and
Benefit Fund.

Dear Sir:

Replying to your letter of recent date relative to the right of Agnes Scanlon, minor child of William J. Scanlon, deceased patrolman, to be paid a pension, I submit the following:

Your letter states that William J. Scanlon was appointed a patrolman on July 1, 1892; was adjudged insane July 16, 1908; and was granted a pension payable to his wife, Elizabeth Scanlon.

The records of the Board show that William J. Scanlon died June 25, 1914; that his wife, Elizabeth, died May 19, 1915; that a pension of \$50 per month theretofore paid to Elizabeth Scanlon was, after her death, paid to H. Durand Ludlow as guardian for Loretta, John and Agnes Scanlon, then minors under the age of sixteen years. Your letter further states that the said minors reached the age of sixteen years on June 16, 1915, October 26, 1920, and December 22, 1922, respectively, and reached the age of eighteen years on June 16, 1917, October 26, 1922, and December 22, 1924.

The only child concerned in the question as to any benefit from the pension fund at the present time is Agnes Scanlon, as the other two children have passed the age of eighteen years.

1.

The law directing the payment of pension benefits to minors upon the death of the father and mother, until the

said minors reached the age of sixteen years, was changed by the legislature in 1917, extending the age period to eighteen years instead of sixteen. This change was effected by means of an amendatory act amending the Pension Act of 1915, which latter act was a continuation of the Act of 1887 as amended. (*People v. Foreman*, 296 Ill. 487.)

2.

Section 6 of the Amendatory Act of 1917 contained the following provision:

“This amendatory act shall not be taken, deemed or construed as retroactive, and neither the pensions granted under the act to which this is an amendment, nor the amounts thereof, shall in anywise be affected except as is specifically provided for in this amendatory act.”

The evident purpose of the legislature in extending the period during which a child shall be paid the benefit, hereinabove referred to, was to enable the child to continue its studies and to secure a high school education; the latter would be an exceptional achievement at sixteen years of age, but eighteen years of age is the general run of ages of high school graduates.

3.

By directing that the act should not be retroactive, the legislature evidently intended that those who had already reached the age of sixteen and had ceased to be recipients of pension benefits should not by the amendatory act be restored to the pension roll with the right to collect benefits subsequent to their removal from the roll. For that reason, apparently, the legislature provided in the clause above quoted that neither the pensions granted under the act, to which this act was an amendment, nor the amounts thereof, should in anywise be affected, except as is provided in the amendatory act.

4.

In the present instance, neither the pension granted, nor the amount thereof, is in any manner affected by the amendatory act, and the only change made, so far as Agnes Scanlon is concerned, was that the period of time during which she should receive benefits was extended two years as is specifically provided in the amendatory act.

I am of the opinion that the present amendatory act of 1917, extending the time of payment of benefits from sixteen to eighteen years, applies to the pension benefit then being paid to Agnes Scanlon.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Proposed Water Supply to Village of Stickney.

January 30, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of January 24, 1924, together with attached copies of correspondence relative to proposed water connection to the Village of Stickney and in answer thereto we are of the opinion that if the City of Chicago will furnish a supply of water at a point on 43d street, 1200 feet west of Cicero avenue, at which point the Village of Stickney bounds the City of Chicago, the said City of Chicago will comply with all its legal obligations.

We do not believe that the said City of Chicago is obliged to furnish a supply of water to any city, town or village applying for same at *any point* on a boundary line between such municipalities that may be designated by the corporate authorities of such latter named city, incorporated town or village.

Respectfully submitted,

THOS. W. FLYNN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Statute Fixing Salary of Chief Probation Officer.

Chicago, January 31, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter of recent date concerning the claim of Former Judge John W. Houston as Chief Probation Officer of the County. You ask for an opinion as to the City's standing on the matter.

The claim arises by reason of the fact that the salary fixed for Mr. Houston by the joint action of the judges of the Circuit, Superior and Municipal Courts was \$5,000, of which the City was expected to pay half, but of which the City paid only such sum as was appropriated from year to year by the City Council. The question presented is another phase of the controversy as to the right of the Municipal Court to bind the City concerning salaries. It involves an exceedingly close and intricate legal point.

The chief probation officer of the County is appointed under the Adult Probation Act of 1911, as amended by the

Act of 1915. (Smith-Hurd, 1923, pp. 735-738.) Under Section 9 of that act it is provided, among other things, that a probation officer may be appointed by the Circuit Court in each county; that in Cook County such power is vested jointly in the judges of the Circuit and Superior Courts; that such number of additional probation officers, not exceeding one for every 50,000 inhabitants, as the judges may deem necessary, may also be appointed by these judges; that a city of less than 75,000 inhabitants having a municipal or city court may have one probation officer to be appointed by the municipal or city court; that all other probation officers except such as are appointed by such local courts in the smaller cities "shall be equally apportioned between the county and the several cities" of more than 75,000 inhabitants (note phrase which is susceptible of different meanings); that the probation officers apportioned to the county shall be appointed by the Circuit and Superior Courts, and the probation officers apportioned to the City shall be appointed by the Municipal Court (this provision being inconsistent with the previous clause providing for appointment of all by the Circuit and Superior Court but probably the one which will be held to control); that the judges of the Circuit and Superior Courts and of the Municipal and City Courts of cities with a population of more than 50,000 shall meet as a "unit body," and at such meeting may appoint a chief probation officer or delegate the power of appointment and removal of such probation officer to a committee.

A part of Section 14 of the same act reads as follows:

"The amount of compensation to be paid any probation officer or chief probation officer appointed by any Circuit Court shall be determined by the board of commissioners or supervisors of the several counties in which said officers respectively are appointed, and shall be paid by the county treasurer on the warrant of the county comptroller or other person authorized to issue warrants on the county treasurer; the amount of compensation to be paid to any probation officer appointed by any Municipal or City Court shall be determined by the city council of the city in which such Municipal or City Court

is situated, and shall be paid out of the city treasury on warrants drawn for that purpose; the compensation to be paid to any chief probation officer appointed jointly by the judges of the Circuit Court of any county, and the judges of any Municipal or City Court, as provided in Section 9 of this act, shall be equally apportioned between the county and the cities, the judges of whose courts made such appointment as aforesaid, and the amount thereof shall be fixed by said judges and approved by the board of county commissioners or supervisors of such county and by the city councils of the cities for which said chief probation officer is appointed as aforesaid; provided, however, that the compensation paid any chief probation officer in counties of the third class shall not exceed six thousand dollars nor be less than five thousand dollars a year."

It seems that the judges, on October 29, 1915, appointed Mr. Houston as Chief Probation Officer and fixed his salary at \$5,000 per annum. The salary was apportioned equally between the City and County. The County has paid its proportionate share of \$2,500 annually ever since. The City, however, paid only \$1,500 a year in 1916, 1917 and 1918, \$1,625 in 1919, \$1,800 a year in 1920 and 1921, and \$2,100 in 1922. It paid the full \$2,500 in 1923.

In one of the letters it is stated that the failure of the City Council to make the full appropriation was due to the fact that Mr. Houston was not represented before the Finance Committee and that the committee did not understand the situation and thought he was attempting to secure an increase of salary from the committee. While this may have been the case, we have no right to assume it in this opinion and feel bound to interpret the law so as to indicate the precise legal status.

Although the question whether the County would be bound by the action of the judges has not been passed on directly, there is good ground for believing that our Supreme Court would so hold, from language used in the case of *Shea v. Sweitzer*, 285 Ill. 465. In that case the status of an employe in the office of the Juvenile Court probation

officer was considered. The court held that he was not a county officer but an officer of the court, following *People v. C. B. & Q. R. Co.*, 273 Ill. 110. By reason of this, the court says, he does not come within the provisions of Sections 9 and 10 of Article X of the Constitution, under which the judges of the Circuit Court determine the number of employes each county officer requires and the compensation is fixed by the county board. Then the court says:

“It is true that the legislature provided that the county board should appropriate money to pay the salaries of probation officers and the expense of conducting that office, but as the office was created by the legislature it could have provided, had it seen fit, that some other body should appropriate the money necessary to conduct the office.”

Shea v. Sweitzer, 285 Ill. 465-468.

A superficial reading of the case last quoted from might readily give rise to the belief that everything is settled by the language quoted, but when it is remembered that the court bases its opinion on the theory that officers of the court are not county officers and that there may therefore be another method prescribed for providing compensation, it adds to the perplexities which confront us, for in the case of the Municipal Court the judges themselves are officers of the City, and all other officers of the court must necessarily be on the same footing.

This brings us again to the same question which was the paramount issue in the case of *People ex rel. Egan v. City of Chicago*, 310 Ill. 534, but recently decided. That was whether the judges of the Municipal Court could bind the City with respect to the number of employes and the salaries of such employes in the offices of the Clerk and Bailiff. The court held that, while Sections 9 and 10 of Article IX of the Constitution prohibited the Legislature from imposing a charge of this kind on the municipality and that this must be left to its corporate authorities, still the judges were such corporate authorities under the law, and the people by voting on and approving the Municipal Court Act had assented to

this method of charging the municipality "for that purpose." Among other things, the court said:

"The Municipal Court Act was adopted by a vote of the people of the City of Chicago. By this action they consented to the manner in which the number and salaries of the deputy bailiff's were to be fixed, and the judges to whom was committed that power became for that purpose the corporate authorities contemplated by the sections of the constitution cited."

People ex rel. Egan v. City of Chicago, 310 Ill. 534.

It may seem like a fine-spun theory to say that the language used, while validating the action of the judges with respect to deputy clerks and bailiffs, inferentially indicates that by the action of the people the power was committed to the judges "for that purpose" but not for any other purpose. Yet that is the way we construe the opinion, and we are therefore constrained to so advise you.

We are satisfied that the provision for appointing the chief probation officer—although subject to some doubt—is not unconstitutional. But the provision which undertakes to say to the City Council that the salary should be not less than \$5,000 per annum, not having been voted upon by the people, cannot be enforced against the municipality. We believe that the clause which provides for the approval of the compensation by the City Council is the only thing which saves the provision from being unconstitutional, and we regard the proviso fixing the maximum and minimum salary as contrary to Sections 9 and 10 of Article IX of the Constitution. Hence, the City Council was within its rights in appropriating such sum as it saw fit from year to year for this position.

By the same token that the City Council has the right to reduce the compensation of the chief probation officer it has the right to increase it; and if it sees fit to make its proportion of the salary for the current and future years more than \$2,500 it may do so. But if it undertakes to reimburse Mr. Houston for the shortage it must do so on the basis of an increase of salary for the present and future and

not on the basis of a change in the salary of former years, since that cannot be done.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Jurisdiction of Interstate Commerce Commission Over Chicago River.

February 2, 1924.

MESSRS. GRIFFENHAGEN AND ASSOCIATES, LTD.,

Chicago, Illinois.

Gentlemen:

We beg leave herein to reply to your communication in which you ask whether the Interstate Commerce Commission has or may exercise any authority over the Chicago River, as a navigable water of the United States, that will affect the Fixed Bridge Survey and Report or that will affect the policy of installing fixed instead of movable bridges over the Chicago River within the City of Chicago, if such change shall be recommended.

The jurisdiction of the Interstate Commerce Commission depends entirely upon the Act of Congress of February 4, 1887, and the amendments thereto, commonly known as the Interstate Commerce Act. Section 1 of said act defining the jurisdiction of the Commission is in part as follows:

“The provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas by means of pipe lines,

or partly by pipe lines and partly by railroad, or partly by pipe line and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. * * *

The term 'common carrier' as used in this Act shall include express companies and sleeping car companies. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property."

We have been unable to find any case (and we think none can be found) in which the question decided was at all like the question asked in your letter. However, we are clearly of the opinion from the language of the act as quoted

above that the Interstate Commerce Commission has no jurisdiction or authority over the navigable waters of the United States as such nor over the opening or closing of bridges across navigable rivers except perhaps in the case where *railroad bridges* are opened or disabled for such time that the railroad service is impaired or interfered with.

Yours very truly,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of City to Regulate by Ordinance the Opening
and Closing of Bridges Over the Chicago River.**

February 2, 1924.

MESSRS. GRIFFENHAGEN AND ASSOCIATES, LTD.,

Chicago, Illinois.

Gentlemen:

Replying to your communication in which you ask whether the City of Chicago has the power to further regulate by ordinance the hours for opening and closing bridges over the Chicago River, we are clearly of the opinion that the City has a continuing power to make and change such regulations as the conditions of traffic on and across said river shall warrant.

The situation presented by the necessity for regulation of bridges across the Chicago River to accommodate and reconcile the needs, as far as possible, of traffic both interstate and intrastate, on the river and traffic across the river in the streets of the state and the power in the Congress of the United States to regulate interstate commerce.

The power of the Federal Congress to regulate interstate commerce is, of course, plenary and supreme and when the Congress has passed laws regulating any particular portion of that commerce or any particular place concerned therewith, any state or municipal law that is contrary thereto is void. *Gibbons v. Ogden*, 9 Wheat, 1.

Yet the Supreme Court of the United States has many times decided that as long as the Congress has not acted, the police power of a state may be used to control a local and dangerous condition even though interstate commerce is thereby regulated and to a certain extent subjected to burdens. *Cooley v. Wardens of Philadelphia*, 12 How. 299; *Willson v. Blackbird Creek Marsh Company*, 2 Pet. 245.

If the state laws are plainly and palpably discriminating, burdensome, vexatious and arbitrary the courts will hold them contrary to the Constitution of the United States. And, in any case where local or state laws cast a burden or interstate commerce the Congress can override such local or state laws by its own acts even though such laws are not so plainly or palpably burdensome as to warrant the courts in holding such laws contrary to the constitution itself. *Gibbons v. Ogden*, 9 Wheat. 1; *Cooley v. Wardens of Philadelphia*, 12 How. 299; *Escanaba and Lake Michigan Transportation Company v. Chicago*, 107 U. S. 678.

In all cases the presumption is that local or state laws enacted in good faith are reasonable and necessary and the burden of showing such laws to be discriminatory and arbitrary rests on whosoever asserts it. *Cooley v. Wardens of Philadelphia*, 12 How. 299; *Escanaba and Lake Michigan Transportation Company v. Chicago*, 107 U. S. 678.

Applying the principles stated above to the regulation of bridges over the Chicago River in the City of Chicago (a subject concerning which no act of Congress has been passed) authority would rest in the State of Illinois and in the City of Chicago to the extent that the State of Illinois has delegated such authority to the City, to regulate the bridges as may seem best so long as such regulations are not plainly and palpably burdensome and discriminatory.

In *Escanaba and Lake Michigan Transportation Company v. City of Chicago* (*supra*), the Supreme Court of the United States, discussing this very matter, said (p. 683):

“The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the City of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary.”

Section 1, Article V of the Cities and Villages Act delegates to the City such power to control the use of bridges within the City as originally existed in the State of Illinois, in the following language:

“The city council in cities, and the president and the board of trustees in villages, shall have the following powers:

* * * * *

Twenty-eighth. To construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.

* * * * *

Thirty-eighth. To make regulations in regard to the use of harbors, towing of vessels, opening and passing of bridges.”

Respectfully submitted,

C. M. DOTY,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Cancellation of Old Warrants After Statute of Limitations Has Run.

February 4, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We have your letter of recent date concerning proposed cancellation of warrants more than two years old, to which was attached a file of correspondence which you ask to have returned with our advice as to what the provisions of the Statute of Limitations are regarding the various classes of warrants which it is proposed to cancel.

Such warrants as are based on oral agreements with the City, such as warrants for salary, for expenses, etc., come within the five year period of limitation, beyond which time no action for a recovery can be maintained. Since there is little likelihood of any warrants being drawn that are uncalled for involving damages, we assume that you do not care for

the Statute of Limitations on either personal injury or property damage claims. On written contracts the Statute of Limitations runs in ten years. If the warrant is based on a judgment, although originally for a claim growing out of an oral contract, the judgment can be revived and kept in force twenty years.

Exceptions to the above are in case of disability by reason of minority or insanity, in which case the statute does not begin to run until the disability is removed; in case an action was started within the five years or ten years, as the case may be, which was dismissed by involuntary nonsuit, in which event the statute runs another year; or in case an injunction prevented the bringing of suit, where the statute begins to run when the injunction is dissolved.

There is no Statute of Limitations in the collection of taxes, and this would probably be construed to run both ways, so that a person having a claim for a special assessment rebate could always have it revived even when it has been restored to the City's fund by operation of the statute.

Neither is there a limitation on claims of municipal corporations or other governmental agencies where such claims are civil liabilities growing out of governmental functions. Therefore, if the county or other municipality had such a claim it could not be outlawed.

It must be understood, of course, that the City cannot take advantage of the Statute of Limitations in case of a cancelled warrant where an action is begun unless this is pleaded in the action, and the question of whether it is proper to plead the Statute of Limitations against a just claim is one that is within the discretion of the City Council. Such a plea may be filed by the City's Law Department without special authority from the City Council, but the Council would have the right to order the plea withdrawn, if it saw fit to do so, under its discretionary powers in such matters.

We assume that you understand that the proposed action in cancelling warrants is not intended to wipe out any claim,

but merely to clear the deck of old warrants and to provide for issuing new ones in their place if occasion demands it.

We return the file of correspondence herewith.

Very truly yours,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Claim for Damages for Delay to Steamer in Leaving
River on Account of Closing of
Bridge for Repairs.**

February 6, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We return herewith files pertaining to the claim of the Rutland-Lake Michigan Transit Co. for \$2,489 for demurrage, etc., on Steamer "Brockton" due to delay at the South Halsted Street Lift Bridge on November 28th and 29th, 1923, together with a report from the Bridge Division as to the facts. In our opinion the City of Chicago is not legally liable, for the reasons hereinafter stated.

The Bridge Division's report indicates clearly that repairs to the bridge were made as promptly as possible and that the bridge was being operated, during this period, under difficult circumstances with a view of accommodating both River and Street traffic without partiality to either. It must be remembered that Halsted street, being one of the main traffic arteries of the City, is heavily traveled, and to close the street, by keeping the bridge raised all of the time while repairs were being made, would work a greater hardship

than lowering the bridge from time to time possibly could. It also appears that it was dangerous at times to raise the bridge, and for that reason it was opened only at certain intervals.

There is no paramount right of commerce by vessel over the right of the public by any other way. The United States Supreme Court in the case of the *Escanaba and Lake Michigan Transportation Co. v. City of Chicago*, 107 U. S. 678-691, in passing on this contention, stated:

“The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and harmonious pursuit of different occupations.”

With the above view in mind, the bridge operator endeavored to keep traffic moving in both directions without too great inconvenience to either class.

The Chicago River is a navigable water over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve and improve its free navigation, but until Congress acts upon the subject, the power of the State over bridges across its navigable streams is plenary.

Escanaba and Lake Michigan Transportation Co. v. City of Chicago, 107 U. S. 678-691.

In this instance Congress has not acted, and the State has delegated to the City the power to regulate the use of bridges within its corporate limits.

Cities and Villages Act, Chap. 24, Art. V, Paragraph 62, Secs. 28 and 38.

The situation in this instance may be analyzed as follows:

The City has the right by law to regulate and control the use of the bridge. While certain repairs were being made, River and Street traffic suffered inconvenience and possibly loss. In passing upon a similar situation our United States Supreme Court decided that:

“Whenever the exercise of a right conferred by law for the benefit of the public is attended by temporary inconvenience to private parties, in common with the public in general, they are not entitled to damages therefor.”

James Hamilton v. Vicksburg, Shreveport & Pacific R. R. Co., 119 U. S. 280-285.

In view of the above, in our opinion, the City is not legally liable in this instance.

Very truly yours,

LAWRENCE J. FENLON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**When Person Subdivides and Sells Land Which He
Owns He is Not Acting as a
Real Estate Broker.**

February 11, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

Your letter of recent date concerning license of Mr. Frederick H. Bartlett, to which was attached a communication from Mr. John Lyle Vette, was referred to the writer for consideration and reply. You say in your letter that Mr. Vette's letter is self-explanatory, and we have therefore assumed that the statements contained therein are correct and that there is no dispute about the facts. We stress this point because Mr. Vette conveys the impression that Mr. Bartlett is doing practically no brokerage business, whereas a few years ago he was engaged in that business in a large way.

It appears that Mr. Bartlett applied for a real estate broker's license for himself personally, and tendered a license fee of \$25. The application was refused because it was not accompanied by a fee of \$5 for each salesman engaged in the sale of subdivisions in which he is interested.

Mr. Vette's letter states that the subdivisions in question are owned by a Massachusetts trust named Frederick H. Bartlett Realty Company. It is also said that in addition to claiming a fee of \$5 for each of the salesmen employed, the City will demand that each of these salesmen shall take out a broker's license. This is looked upon as inconsistent on the part of the City, Mr. Vette's theory being that a person could not be regarded as an employe of a licensed broker and at the same time a broker on his own account.

The position taken by the City is not necessarily inconsistent. A person may be an employe of a real estate broker for whom the broker is required to pay an extra fee under Section 382 of The Chicago Municipal Code of 1922 and at the same time be a broker selling on commission "through the medium of another licensed broker," under the provisions of the same section. We doubt very much, however, whether the persons under consideration in this instance can be classed as brokers.

The definition of a broker, as given in Section 374 of the Code, includes any person, firm or corporation "other than an employe of the principal or principals for whom the business is done" that trades on a commission basis. This provision, like all other provisions of penal ordinances, must be strictly construed. We do not think this can be enlarged or amplified by construing the definition of a real estate broker (which is susceptible of two interpretations) so as to include persons who are employes of the principal and act only for the one principal and no other.

The part of Section 382 which gives rise to the question reads as follows:

"Any person, firm or corporation that, for another, in consideration of a commission, brokerage or other

compensation, makes it his, their, or its vocation or business, in part or in whole, to sell, exchange, buy or lease, or to negotiate the sale, exchange, purchase or lease, of any real property or interest therein, or engages in the renting or management of real property, or negotiates real estate loans or real estate mortgages, or acts through the medium of another licensed broker for any of the purposes aforesaid, shall pay an annual license fee to the city collector as hereinafter provided."

While in one sense of the word a person who sells lots on commission for his employer is selling "for another," we are constrained to hold that when taken in connection with the general definition of broker that precedes it and applies to real estate brokers as well as all other brokers, the words used in the quotation were not intended to apply to an employee selling his principal's property even though he is compensated by commissions. We are all the more disposed to lean towards this position because the other interpretation would cast grave doubt on the validity of the provision. (See *Linehan v. City of Chicago*, 227 Ill. App. 255.)

It appears that the Frederick H. Bartlett Realty Company does no brokerage business, but confines its operations to the sale of its own real estate, and the salesmen employed by it are engaged exclusively on this work. Consequently the license to Mr. Bartlett is one that authorizes him personally to transact business as a broker, which, it is said, he "very seldom" does.

We therefore recommend that the license be issued to Mr. Frederick H. Bartlett without additional fees for employees, unless upon further inquiry you find that he employs two or more persons in his personal brokerage business (as he did formerly), in which event our recommendation would be the reverse.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Interpretation of Ordinance Regulating Sale of Ice and Requiring that it be Sold by Avoirdupois.

Chicago, February 11, 1924.

HON. CARMEN VACCO, Inspector of Weights and Measures.

Dear Sir:

Your letter relative to the interpretation of Section 1975 of The Chicago Municipal Code of 1922, which governs the manner of selling ice, was referred to the undersigned for consideration and reply. You attached to your letter a communication from Cornelius Lynde, Esq., representing the Association of Commerce, and we have carefully considered the points he makes as well as your own in reply to his suggestions.

The controversy hinges on the interpretation of the last clause of the following provision of Section 1975:

“Every person, firm or corporation selling ice or offering ice for sale shall, at the time of the delivery of any ice sold, weigh the quantity of ice delivered, and for that purpose shall be provided with a steelyard balance or other apparatus for weighing such ice, which shall have been duly adjusted and sealed by the inspector of weights and measures in accordance with the provisions of this ordinance; and all ice sold within the city shall be sold by avoirdupois weight unless it is otherwise specifically agreed upon between the buyer and seller.”

Mr. Lynde first takes the position that this ordinance does not require sales to be made by weight. While we do not believe that is correct, as we show later on, nevertheless there would be some ground for assuming that the ordinance does not forbid the parties to a sale from coming to an agreement by which ice may be purchased by cubic contents or by the load or some other way which is mutually agreeable.

But Mr. Lynde goes farther, and says that in his opinion the peddler of ice may say to his customer, “I will not make a sale by weight, I am prepared to sell you this block at such and such a price,” and that if the customer accepts the

block at the specified price the dealer is within the law. (The words we quote are his own.) With such an interpretation as a basis, we apprehend that it would be rather awkward for Mr. Lynde to explain what the purpose of the ordinance was. His interpretation amounts to saying that ice may be sold by *avoirdupois* weight, but it may be sold by the chunk when the dealer elects to do so, and the purchaser having received a chunk of ice will not be heard to complain.

An ordinance of this kind must be interpreted as a whole, and its purpose forms a part of the meaning of every clause within it. It is not reasonable to suppose that the ordinance would require every dealer in ice to carry a scale with him, and then require him to weigh the quantity of ice delivered, merely for the purpose of telling the purchaser when the weighing is done that no matter what the weight is he will have to pay the price for full weight for the chunk as it stands regardless of weight or the deal is off. This is the way the matter would work out if the interpretation contended for is correct.

Our own interpretation of the ordinance is that the ice must be weighed, and that the provision for a specific agreement relates to the *avoirdupois* weight. In other words, no one is to be fooled by a troy weight scale, or an apothecary's weight scale, or a metric system scale, or a "gross ton" or "net ton" interchangeable system, or any other subterfuge. It must be sold by *avoirdupois* weight unless otherwise specifically agreed. Any other construction placed upon this ordinance would render the first portion of it entirely meaningless.

We therefore regard it as within your power to enforce the provision in reference to the weighing of the ice and its sale by *avoirdupois* weight.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Interpretation of Police Pension Act Relative to "Duty Disability."

February 11, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

Replying to your request for an opinion as to the interpretation to be given Section 45 of the Policemen's Annuity and Benefit Fund Act relative to the allowance of duty disability benefit, I submit the following:

1.

Section 45 provides as follows:

"Benefit to be known as 'Duty Disability Benefit' shall be provided for policemen in the service who shall become disabled as the result of injury incurred in the performance of any act or acts of duty."

"Any policeman less than fifty-seven (57) years of age, who shall become disabled subsequent to the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, as the result of injury incurred in the performance of any act or acts of duty, shall have a right to receive duty disability benefit during any period of such disability for which such policemen shall not receive nor have a right to receive salary, of an amount equal to seventy-five (75) per cent of his salary as it shall be at the time of such injury."

(Then follows a provision relating to payment for children under eighteen years of age.)

Nothing is said in this Pension Act, nor in any other act that I had been able to discover, bearing on the question as to the length of time that must elapse between the injury and the disability, nor is there any provision as to whether the benefit to be paid shall be computed under the law exist-

ing at the date of the injury, or under the law in force at the date of the application.

2.

It was the evident intention of the legislature, and it is so expressed in the Act, that benefits shall be allowed only for "disability" arising from injury and not for the injury itself.

Section 12 of the Policemen's Annuity and Benefit Fund Act defines "disability" as follows:

"Disability: A condition of physical or mental incapacity on the part of a policeman to perform the duties of his position in the service."

It has been the universal custom, and it is the law, to fix benefits under whatever law is in force and effect at the time the right to a benefit accrues or accrued. This has been the rule, the practice and the law, in fixing death benefits, ordinary disability benefits and benefits for the insane. Under the same reasoning, duty disability benefit should be fixed under the law as it exists or existed at the time the right to duty disability accrues or accrued.

- (a) But such right does not accrue until the retirement board passes on the question as to whether or not disability exists.
- (b) And declares an award or grant of disability benefit.

3.

In fixing the disability, the "salary" upon which the duty disability is based, however, is not the salary being paid to or received by the applicant at the time of his application for disability benefit, nor his salary at the time the benefit is granted, but is specifically designated in Section 45, hereinabove referred to, as "his salary as it shall be at the time of such injury."

In the event that the applicant received more than one injury, the "salary" to be used as the basis for computing his disability benefit would necessarily depend upon which

injury was the proximate cause of his disability; this would be a medical question.

4.

I am of the opinion that all applications for duty disability benefit, filed since January 1, 1922, if allowed, should be computed in accordance with the provisions of the present Policemen's Annuity and Benefit Fund Act, namely, seventy-five (75) per cent of the salary of the applicant as such salary was at the time of the injury which occasioned or was the proximate cause of the disability.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Buses Used for Club Members Only Are Not a Public
Utility and Are Not Within the Jurisdiction of
the Illinois Commerce Commission.**

February 13, 1924.

MR. I. LEE SEARS, Secretary, Local Transportation Committee.

Dear Sir:

We have your letter of the 5th inst. concerning the use of motor buses by the members of the Fifteenth Ward Improvement Club, and requesting an opinion as to whether the operation of the buses constitutes a public utility within the jurisdiction of the Illinois Commerce Commission.

We understand the facts to be that the Fifteenth Ward West End Improvement Club is an organization of a number of years standing in the territory that was formerly the

Town of Stickney; that the purpose of the organization is the general improvement and betterment of the locality in question; that at the present time the residents of this locality are required to pay two fares to get from their homes to the business center of the city, one of ten cents to the Chicago & Joliet Electric Railway Company, and a seven cent fare to the Chicago Surface Lines; that in order to provide transportation for its members at a less cost than the amount named, it is proposed by the club to operate motor buses for the use of its members to furnish the service and transportation at present furnished by the Chicago & Joliet Electric Line; that no rate of fare is to be charged, but that the expense of operation is to be borne by the club in the same manner as are its other operating charges and expenses to be paid from the club funds; that no profit is to be derived from the operation of the buses; that the buses are not to be in any sense public conveyances for the use of anyone who offers himself as a passenger, but are solely and exclusively for the use of the members of the club, to whom some means of identification will be furnished.

On this state of facts we are of the opinion that the buses so operated do not constitute a public utility within the meaning and contemplation of the Illinois Commerce Act, and that, therefore, no certificate of public convenience and necessity from the Illinois Commerce Commission is required to authorize the use and operation of the buses for the purposes and within the limitations mentioned. The jurisdiction of the Commission is by the terms of the act confined to control and supervision of owners and operators of property devoted to public use.

Our Supreme Court in *Utilities Com. v. Bethany Tel. Assn.*, 270 Ill. 183, defined a public use in the following language (p. 185):

“To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it. It is not essential to a public use that its benefits should be received by the whole public or

even a large part of it, but they must not be confined to specified, privileged persons. * * * The words 'public use' mean of or belonging to the people at large, open to all the people to the extent that its capacity may admit of the public use. * * * *The use must concern the public as distinguished from an individual or any particular number of individuals*, but the use and enjoyment of the utility need not extend to the whole public or any political subdivision." (Italics ours.)

We are clearly of opinion, both on principle and the authority quoted, that the contemplated operation of the bus line will not constitute a public utility, and is, therefore, outside the jurisdiction of the Commission. The Fifteenth Ward Improvement Club should, however, be strongly advised that any change or deviation from the plan of operation indicated, may materially alter the legal status of the bus line, and special reference is hereby made to the fact that this opinion is based on a strict compliance with the facts hereinbefore set out. The club should likewise be informed, before any expense or liability is incurred that the legal conclusion we have reached, viz., that such buses are not public but private conveyances, is no bar to the institution of proceedings by anyone adversely interested, to have a judicial determination of the question involved.

Yours very truly,

JAMES J. COUGHLIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Authority of Board of Education to Suspend Employes for More Than Thirty Days.

February 14, 1924.

MR. W. FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

You addressed a request to Honorable Francis X. Busch, Corporation Counsel, for an opinion upon the letter of Mr.

Fred C. Smith questioning the power of the Board of Education to suspend employes for more than thirty days.

The powers of the Board of Education to appoint and remove employes other than those exempt from the Civil Service Law are specified in the last paragraph of Sec. 129, Ch. 122—Schools—(Smith-Hurd's St. Ill. 1923). That paragraph reads as follows:

"Section 129. * * * All appointments of other employes of the board of education, except as herein otherwise provided, shall be made pursuant to the provisions of the civil service law, and no civil service employe shall be removed except for cause, and then only by a vote of not less than a majority of all members of the board upon written charges to be heard by the board, or a duly authorized committee of the same, *after thirty days' notice with copy of the charges, is served upon the person against whom they are preferred, who shall have the privilege of being present, together with counsel, offering evidence and making defense thereto. The action and decision of the board in the matter shall be final. Pending the hearing of such charges, the person charged may be suspended as by the rules of the board may be prescribed:* Provided, however, that in the event of acquittal, such person shall not suffer any loss of salary by reason of the suspension. Teachers shall be exempt from the provisions of this section. (As amended by act approved April 20, 1917.)"

The printed rules of the Board contain the following provisions:

"Section 6. (EMPLOYEES—HOW REMOVED.) No principal or teacher, or employe appointed pursuant to the Civil Service Law, who shall have served the probational period required by law, shall be removed except for cause, and then only by a vote of not less than a majority of all members of the Board, upon written charges, to be heard by the Board, or a duly authorized committee of the same, *after 30 days' notice, with a copy of the charges, is served upon the person against whom the charges are preferred, who shall have the privilege of being present and making defense thereto. At the request of any party hearing shall be public.*"

(Page 2, Rules of the Board of Education, Ch. 11, Sec. 6.) Adopted September 1, 1922.

Under miscellaneous, among other matters, the board rules that

“*After the filing of written charges against the employe and pending the hearing and final disposition thereof, such employe may, on the recommendation of the department head, be suspended by the president of the board, etc.*” (Sec. 2, Art. 3, Chap. 9—Rules of Bd. of Ed.)

Disciplinary measures are authorized by the following section of the statute:

“154. *By-laws, etc.*) Section 131. The board of education shall, subject to the limitations contained in this act, establish by-laws, rules and regulations, which shall have the force of ordinances, for the proper maintenance of a uniform system of discipline for both employes and pupils, and for the entire management of the schools. * * *

Plainly, the Act of 1917 confers upon the Board of Education full authority to suspend such employe after the filing of charges during the hearing thereon and until their final disposition.

Very truly yours,

CORA B. HIRTZEL,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Rights of Certain Members of Police Department to be
Given Credit for Full Time of Service Where
They Have Not Made Contributions
for Full Time.**

February 14, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and
Benefit Fund.

Dear Sir:

You have requested from me an opinion as to the right of police operators, police patrol drivers and similarly sit-

uated policemen, to be given credit for full time of service in the Police Department on their certificates for prior service where contributions have not been made by them for the full period of time for which they are claiming credit, and I submit the following:

1.

The present policemen's Annuity and Benefit Fund Act specifically provides (Section 49) that in computing the term of service rendered by any policeman prior to the 1st day of January, 1922, there shall be counted *all periods of time during which such policeman shall have performed the duties of his position*, together with all periods of vacation, all periods of leave of absence with whole or part pay, and all periods of leave of absence without pay which were necessary on account of disability. Nothing is said about limiting the term of service, so credited to the period contributions were made to a pension fund and we cannot read into the act any limitation or modification. *Stiles v. Board*, 281 Ill. 636, 642.)

2.

The present Policemen's Annuity and Benefit Fund Act also provides (Section 19, Paragraph "B") that each "present employe" shall be credited to his account with an amount equal to eight and one-half per cent ($8\frac{1}{2}\%$) of his annual salary as it should be on January 1, 1922, for a period of time equal to that of *such service rendered before* said January 1, 1922.

3.

If there were any doubt as to the right of police operators, police patrol drivers and all other members of the Police Department to be given full credit for their term of service, without regard to contributions paid into the pension fund by them, I feel that such doubt would be resolved beyond question in favor of such allowance by reason of the

provisions of Section 55 of the present Policemen's Annuity and Benefit Fund Act, which section reads as follows:

"Notwithstanding the provisions of any foregoing section or sections of this act, any present employe who shall resign or be discharged from the service on or after the first day in the month of January of the first year after the year in which this act shall come in force and effect in such city, and after he shall have completed twenty (20) or more years of service and for whom the amount of annuity provided in accordance with the foregoing provisions of this act shall be less than the amount stated hereinafter in this section shall have a right to receive annuity as follows:"

(Then follow details as to payments.)

This provision of the act, without quibble or equivocation, specifically declares that every present employe *after he shall have completed twenty (20) or more years of service* shall be granted a pension, without regard to what his contributions to any pension fund may have been or may not have been.

Under Section 55, the grant of a pension after twenty (20) or more years of service is absolute. There is no provision, phrase, clause or expression in Section 55 limiting in any manner such right, or making such right dependent or subject to payments or contributions on the part of such present employe. The right to a pension under Section 55 is dependent solely upon twenty (20) or more years of service.

4.

I am of the opinion that "present employes" are entitled to be credited with the *full term of service* rendered by them prior to January 1, 1922, for annuity purposes only.

I am of the opinion that any "present employes" who have not contributed the full amount of their contributions since July 1, 1915, should be permitted to now make those contributions, if they so desire, and be given credit in their account for the moneys so contributed.

I am of the further opinion that in the fixing of annuity payments, the Pension Act does not contemplate that any policeman shall be deprived of his service credits, which are the basis of his pension, because of failure on the part of the City to make the proper deductions from his salary, if such failure occurred, but that, on the contrary, the present act specifically provides that the Retirement Board shall ascertain his *term of service* and that there shall be credited to his account eight and one-half ($8\frac{1}{2}\%$) per cent of his annual salary as the same was on January 1, 1922, "for a period of time equal to that of such service" rendered before January 1, 1922.

I am of the further opinion that under Section 55 of the present Policemen's Annuity and Benefit Fund Act any "present employe" who has completed twenty (20) or more years of service shall have a right to receive annuity in accordance with the provisions of Section 55, without regard to the question of contributions made or not made to any pension fund by him.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**City Comptroller Not Obligated to Check Accuracy of
Report of Chicago Surface Lines Under Provi-
sions of the Ordinance, Unless so Directed
by the Mayor or Council.**

February 15, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

Replying to yours of November 1, 1923, inquiring whether it is the duty of the Comptroller's office "to check

the accuracy of the reports of the Chicago Surface Lines, submitted in accordance with the terms of Section 30 of the Chicago Railways Ordinance, and similar terms in other ordinances, and whether it is necessary that he be specifically directed by the Mayor or City Council to do this work," we submit the following:

The provision referred to is Section 30 of the Chicago Railways Company Ordinance, Section 29 of the Chicago City Railway Co. Ordinance, and Paragraph 9 of Exhibit "A" to the Unification Ordinance. It is provided, in substance, that the company, on or before the 10th day of April in each year, shall prepare and file with the City Comptroller annual reports for the year ending January 31st, setting forth the character and amount of business done and the amount of receipts and expenses of conducting such business, "and the said City Comptroller, or accountants authorized by him. under the direction of the Mayor or City Council of said City, shall have the right at all reasonable times to examine all the books, vouchers and records of the receipts and expenditures of the company, for the purpose of ascertaining the accuracy of the reports herein required and the rights of the said City under this ordinance. The Board of Supervising Engineers shall have the power to prescribe the form and manner in which the books of the company shall be kept subject to the approval of the City Comptroller," etc.

The language employed in the section quoted is, we think, plain and unambiguous, and we are unaware of and have been unable to find any other ordinance or provision touching on the same subject-matter. We are of opinion that the quoted provision imposes no mandatory duty on the City Comptroller to inspect and examine the companies' books on his own motion. We think the ordinance merely vests a discretionary authority in the Mayor or City Council to require that the Comptroller shall make such examination. And we are further of the opinion that the Comptroller only has such right when so directed. To hold otherwise would be to disregard deliberately that portion of the section which provides:

“and the said City Comptroller, or accounts authorized by him, *under the direction of the Mayor or City Council of said City*, shall have the right at all reasonable times to examine all the books,” etc.

In order to give effect to this language, we think it must be held that the City Comptroller must be directed by the Mayor or the City Council to make the examination, and we are, therefore, of opinion that the ordinance gives the Comptroller no right to make the examination on his own motion.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Effect of Marriage of Minor Child Upon the Payment
to Its Mother of Pension Under Police
Pension Fund Act.**

February 18, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and
Benefit Fund.

Dear Sir:

Replying to your letter of February 14, 1924, relative to the right of Mary Breen to continue to be paid \$5 per month for her daughter not eighteen years of age, I submit the following:

Your letter states that Mrs. Breen has reported to you the marriage of her daughter and requests an opinion as to whether such marriage would operate to cancel the payment from the Policemen's Annuity and Benefit Fund of \$5 per month on account of the child.

I find no provision in the law to the effect that the marriage of a child under eighteen years of age would operate to terminate the payment of the benefit to the mother of the child. Legislative action would be necessary to establish a right in the Retirement Board to terminate the payment.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Computation of Disability Benefits Under Police Pension Act of 1921.

February 19, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

Replying to your inquiry as to the rights of Edward McNamara in his duty disability benefit, I submit the following:

1.

The records of the Board show that on August 28, 1923, Edward McNamara made application for duty disability upon the ground that while looking for a prisoner on April 18, 1921, the applicant was shot through the face causing a deformity of the face and rendering him unfit for police duty; said application being accompanied with certificate of Henry J. Way, M. D., physician for the Board, substantiating the nature of the injury.

The records also show that an application of Edward McNamara for duty disability benefit was granted on September 12, 1923, and benefit allowed him in the sum of \$900 per year, he having no children, according to his application.

2.

I have heretofore, to wit, on February 11, 1924, submitted an opinion to the effect that all applications for duty disability benefit filed since January 1, 1922, if allowed, should be computed in accordance with the provisions of Section 45 of the present Policemen's Annuity and Benefit Fund Act, namely, 75 per cent of the salary of the applicant as such salary was at the time of the injury, which occasioned or was the proximate cause of the disability, together with child's allowance in the case of there being children.

In applying this provision of the act, there are three classes of possible beneficiaries to be considered:

- (a) Present employes injured prior to January 1, 1922.
- (b) Present employes injured subsequent to January 1, 1922.
- (c) Future entrants.

This section (45) must be interpreted in conjunction with all the other provisions of the act. *Colton v. Trustees*, 287 Ill. 56, 59.

3.

Section 12 of the Policemen's Annuity and Benefit Fund Act provides as follows:

"The following words and terms as used in this Act shall mean as follows, respectively:

Salary: Annual Salary: Provided that \$2600.00 should be the maximum amount of the annual salary of any policeman which shall be considered for any purpose in this Act. Any amount of annual salary in excess of \$2600.00 which any policeman should receive shall not be considered for any purpose in this Act."

Section 14 of the Policemen's Annuity and Benefit Fund Act provides as follows:

“For all purposes of this Act it shall be assumed that the annual salary of any present employe has been of the same amount throughout the entire period of service rendered by such employe prior to the first day in the month of January of the first year after the year in which this Act shall come in force and effect, in such city, that such salary shall be at five o'clock P. M. on the 31st day in the month of December of the year in which this Act shall come in force and effect in such city.”

It was the evident intention of the legislature that all present employes should be treated equally and that no discrimination should be made as to employes in the same branch of the department because of possible variations in salary during their respective periods of service. Hence, the legislature definitely and positively established the salaries as they existed at five o'clock p. m. on December 31, 1921, as the basis of computation for any and all benefits payable to present employes under the provisions of the present act whenever amount of such salary at any given time prior to January 1, 1922, was to be such basis.

4.

I am of the opinion that Edward McNamara, being a present employe injured prior to January 1, 1922, but placed on disability after January 1, 1922, should have been granted duty disability benefits under Section 45 of the present Policemen's Annuity and Benefit Fund Act in an amount equal to 75 per cent of the salary of the said Edward McNamara as such salary was at five o'clock p. m. on December 31, 1921. Mr. McNamara also is entitled to recover, and should therefore be paid, the difference, if any, between what he has already received and what he would have received had duty disability been originally granted in accordance with the foregoing opinion.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Taking Bids for Patented Article in Construction of Streets.

February 19, 1924.

MR. EDWARD J. GLACKIN, Secretary, Board of Local Improvements.

Dear Sir:

I am in receipt of your letter of February 14th, requesting an opinion as to whether it would be possible to take bids and let a contract for Willite pavement unless alternate estimates were made and included in the resolution and ordinance.

The use of patented articles such as Willite pavement in the construction of streets is permitted by an act of the legislature in force July 1, 1919 (Cahill's Illinois Revised Statutes, 1923, page 3016), which reads as follows:

"Sec. 227. USE OF PATENTED ARTICLES FOR CONSTRUCTING AND MAINTAINING HIGHWAYS.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any article, material or process covered by Letters Patent granted by the United States Government may be specified and used for constructing or maintaining any proposed public highway, road or street or section thereof whether built by the State or by any county, city, town, village, township or district: *Provided*, that said specifications are drawn so as to provide for an alternative method or methods of construction so that competition may be had between different types of materials answering the same general purpose."

Prior to the passage of this law the use of patented articles by municipalities in the construction of roads and streets by special assessment was forbidden by Section 74 of the Local Improvement Act.

In my opinion, under the act of the legislature of 1919, patented materials may be specified only when the specifications provide for an alternative method or methods of construction, and such alternative method or methods must be included in the engineer's estimate, resolution and ordinance.

Very truly yours,

PHILIP J. McKENNA,

Approved: *Attorney, Board of Local Improvements.*

FRANCIS X. BUSCH,
Corporation Counsel.

Procedure to Protect City's Rights Upon Failure of Bank Which is City Depositary.

February 21, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire as to the steps necessary to protect the City's interests in the matter of the suspension of the State Commercial and Savings Bank, in which the City had the sum of \$60,000 on deposit. Attached to your letter is a copy of one from the City Treasurer to you and a copy of the letter from the Continental and Commercial National Bank to the City Treasurer.

At the time the bank was closed by the State Auditor a transfer warrant was drawn for the sum on deposit. This went through the usual channels and was returned dishonored. We then advised the City Treasurer to have the payee send a messenger in person to the bank for the purpose of making demand. This was done with the result that the messenger found the bank closed. This satisfies the requirements so far as demand is concerned.

At the same time that the writer advised the treasurer, we inquired whether the sureties had been notified. We were told that this had been done as soon as word was received by the Comptroller that the bank had been closed. You further confirm this now by saying that three of the four sureties have acknowledged the receipt of your notice, and we suggest that you call up the fourth and make sure that this surety has also received the notice.

When that will be done the rights of the City will be protected, and the sureties can then be called upon to make good the loss. If demand was not included in your notice to them it will be proper to make demand forthwith.

If any of the sureties desire to settle they probably will want an assignment from the City of the proportionate part of the claim that they will pay. We will respond to a call at such time if you require the advice of the Law Department. Such assignments can be made without Council action, but the bonds of the sureties cannot be cancelled and returned to them without express authority to do so from the City Council.

If the sureties indicate any intention of contesting the City's demands we will take such action as the exigencies of the situation may require.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Interpretation of Zoning Ordinance as to Provisions for Existing Buildings.

February 23, 1924.

H. T. Frost, Esq., Secretary, Board of Appeals.

Dear Sir:

This will acknowledge receipt of your letter of February 20th, submitting the following question to this department:

“In interpreting Paragraph C, shall buildings not now erected (but which may be built in accordance with Paragraph G nearer to the street than the established building line because they adjoin buildings which are nearer than the average) be regarded as though they do exist and the average distance of the building may be computed on that basis?”

Paragraph C of Section 22 of the Zoning Ordinance provides in part as follows:

“(c) Where a block is occupied or partially occupied by buildings which existed in the block at the time of the passage of this ordinance, the average of the distances from the street line of the front street walls of buildings shall be the established building line. * * *”

From a reading of the above, the meaning would seem to be clear that the established building line is determined by taking the average of the distance from the street line of the front street walls of buildings which *existed* at the time of the passage of the Zoning Ordinance. Such is the established building line under Section C, except where otherwise modified or qualified in the ordinance.

Paragraph G of the Zoning Ordinance reads as follows:

“Where any existing building erected prior to the time of the passage of this ordinance has its street wall nearer to the street line than the building line as established by this section, then the street wall of any building erected or altered on that 75 per cent of the frontage

not in excess of 30 feet of the adjacent lot which immediately adjoins the lot occupied by such existing building may approach not nearer the street line than the street wall of such existing building.”

The last mentioned paragraph has a plain and evident purpose. A building in a block might have its street wall closer to the street line than the established building line as provided by Section 22, and the City Council by Paragraph G saw fit to provide that the owner of an adjacent lot, which lot immediately adjoins the lot occupied by such *existing* building, may place the street wall of his building (for 75 per cent of the said frontage so adjoining and not in excess of 30 feet) as close to the street line as said existing building. An owner of such adjacent lot, however, might never take advantage of this right which the ordinance gives him, or he might place his building further back than required by the said Paragraph G or the said adjoining lot might remain vacant. Paragraph C definitely establishes the building line in all blocks occupied or partially occupied by the buildings which existed in the block at the time of the passage of the ordinance. Paragraph G has no relation to Paragraph C except in cases which might fall exactly within the provisions of said Paragraph G.

I do not see how Paragraph C could be properly interpreted to regard, for the purpose of establishing the building line, buildings as existing which do not exist and which may never exist, because under Paragraph G said now non-existing buildings may some day exist and be closer to the street than the building line established. The provisions of Section 22 relative to the establishment of building lines are complete and in great detail. If it was the intention of the framers of the ordinance to regard buildings as existing which do not exist in establishing building lines under Paragraph C, the ordinance would plainly indicate the purpose, and if Paragraph C and Paragraph G are to be given a different meaning than that before indicated, it would be necessary to qualify words found therein by introducing other words which would change the effect of the section, but no such construc-

tion can be given under the plain provisions of Section C and under the likewise plain provisions of Section G.

In my judgment, buildings not now erected, but which may be built hereafter in accordance with Paragraph G nearer to the street than an established building line because they adjoin buildings which are nearer than the average, should not be regarded as though they do exist, and the average distance of the buildings back should not be computed on that basis.

Yours very truly,

WM. L. SULLIVAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Computing Distances Under the Provisions of the Zoning Ordinance.

February 25, 1924.

H. T. FROST, Esq., Secretary, Board of Appeals.

Dear Sir:

I beg to acknowledge receipt of your letter of February 20th, submitting the following question to this department:

“Shall computed distances (that is, distances which are the result of a figure developed by the addition of several figures and divided by a number) be used to the nearest integral foot only? (See Paragraph 1.)”

Section 22, Paragraph 1, in so far as it is material to the question under discussion, is as follows:

“* * * All measured distances shall be to the nearest integral foot. If the fraction is one-half foot or less the integral foot next below shall be taken.”

In regard to *measured* distances, surveyors as well as laymen in making such measurements, might disagree on the measurements taken in the matter of inches. To take care

of just that situation, the ordinance provides that *measured* distances be to the nearest integral foot.

Computed distances, however, present a different situation. Here there can be no disagreement. It is simply a question of arithmetic and a question on which all who do the computing in the nature of things must reach the same result.

The ordinance provides that *measured* distances be to the nearest integral foot. It makes no such provision relative to computed distances, that is, distances which are the result of a figure developed by the addition of several measured distances and divided by a number.

My opinion is, therefore, that computed distances shall be exactly what the computation shows and not the nearest integral foot.

Yours very truly,

WM. L. SULLIVAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**When Quarry in Residential District is a Nuisance—
Power of City to Purchase or Condemn for a
Dump—Necessity of an Appropriation
Prior to Such Proceedings.**

Chicago, February 25, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your letter concerning the proposed acquisition of the quarry hole located in the square bounded by Lincoln, 18th, Robey and 19th streets, to which you attached a letter from the Superintendent of Streets and a plat of the property. You ask to be advised as to several matters, among them what would be the best method of acquiring the property, whether there would have to be an appropriation made

before condemnation proceedings could be started, and whether there could be any steps taken to prevent excavation to a greater depth than at present.

You state that the property in question is not for sale, that the hole is now 350 feet deep, and that the owners are planning to excavate it to a much greater depth. The Superintendent of Streets says that an explosion occurred there some time ago which did considerable damage to surrounding residences.

Whether the operation of the quarry in the heart of a residential district can be regarded as a nuisance is a question that the City Council alone has the right to determine.

The mere fact that the hole is very deep and that it is growing deeper may not in itself damage or endanger surrounding property. Without having any expert advice on the subject, we are disposed to say that we do not know how this interferes with the health, safety or comfort of the people of the neighborhood so far as the maintenance of the hole itself is concerned. If the stone surrounding the hole is firm enough so that it will not cave in, and the hole is properly protected, so that there is no danger of accident on account of a vehicle going over the edge, it would be hard to say that the maintenance of the hole or the deepening of it constitutes a nuisance. But if it is actually a menace, as you seem to think it is, and this can be shown to us, we would change our opinion on this point.

On the other hand, the fact that blasting is necessary for the operation of the quarry, with its attendant dangers of transporting, storing and using high explosives, the dust and noise incidental thereto, the operation of a stone crusher in connection therewith, and other matters which could be mentioned, might well cause the City Council to take action.

If the property is desirable for municipal purposes the City has power to acquire it by condemnation proceedings. Such manner of acquiring property contemplates a preliminary offer. This is often regarded as a jurisdictional prerequisite under our law, although we doubt whether such a proceeding can be defeated on this point alone. In case of a

failure to agree with the owners the condemnation suit can then be started.

In order to make a *bona fide* offer it is necessary to have the means of paying, and to that end it is desirable to have an antecedent appropriation. The question of the sufficiency, validity and availability of such appropriation is so frequently (we think improperly) raised in this class of cases that we do not care to concede that it is necessary to have such an appropriation. At any rate we do not concede that parties who are defending against the condemnation proceeding have a right to scrutinize the appropriation, if there is one. We contend that the good faith of the City Council in authorizing condemnation proceedings cannot be questioned, and since, when the judgment of condemnation is entered, the City still has the right to reject or accept the property, the appropriation is not a jurisdictional prerequisite. This has not been settled by any decision of a reviewing court to which we can point, but it is the position that we have always maintained successfully in the past. The fact that an absolutely good appropriation may turn out after judgment to be inadequate, fortifies the point we make in this respect. We have no hesitation in saying, however, that it is highly desirable to have a valid appropriation available when the offer is made, and this should be at least as much as is necessary to make good the offer that is authorized.

You are, of course, aware that the City's right to acquire property for the purpose you mention—waste disposal—has been questioned, and that there is now pending in the Supreme Court a case that raises that point.

We return herewith the plat of the property which you submitted to us, also the letter of the Superintendent of Streets mentioned above.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Leases Made by the Illinois Central Railroad and
Michigan Central Railroad to Goodrich Transit
Co. in Violation of Agreements With City.**

February 27, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

You ask if existing leases from the Illinois Central Railroad and Michigan Central Railroad to Goodrich Transit Company are in violation of agreements made by those railroads with the City. They are.

The Lake Front Ordinance was passed by the City Council, July 21, 1919. Acceptances were filed by both railroad companies, February 18, 1920. Clause d, Section 10, of the ordinance provides:

“d. To construct and from time to time reconstruct and maintain, subject to the General Ordinances of the City, on the lands bounded and described as follows:

Beginning at the intersection of the North Line of E. Randolph street with the East line of Beaubien court and running thence north, along said east line of Beaubien court and said east line extended north, to the north line of E. South Water street; thence * * * (See Plat G-1).

* * * Thence North on a line parallel to and two hundred and fifty (250) feet East of the east line of Michigan avenue as originally platted, to the Chicago river; thence easterly along the Chicago river to the United States harbor line as now established; thence southerly and westerly along said Harbor line to an intersection with the north line of E. Randolph street, extended, and thence West along said North line to the point of beginning; railroad freight terminals, including buildings, driveways, subways, viaducts and tracks, including the right to rearrange or fill in any slips or docks within said boundaries, and to locate tracks within said boun-

daries; provided, however, that no part of said area shall, without the consent of the City hereafter given by ordinance, be used for the loading or unloading of freight or passengers to or from boats, except bulk freight and interchange freight or passenger traffic between boats and the Central Company or the Michigan Central R. R. Co., or their respective corporate successors, and subject to existing leases in force January 1, 1919. The material used for such filling shall be free from animal or vegetable matter and shall consist of sand, earth, clay, cinders, slag, or debris, or of such other material as shall be approved by the Commissioner of Public Works of the City; and such filling shall be retained behind suitable bulkheads to be constructed according to plans to be approved by the Commissioner of Public Works of the City; and said Commissioner shall issue from time to time permits for the filling of such slips, or docks, or any of them in accordance with the provisions of this section. Connections between any viaducts or driveways built by the Central Company or the Michigan Central R. R. Co. within said boundaries, and streets or viaducts of the City, lying west or south of the boundaries of said lands, shall be made in accordance with plans and specifications approved by the Commissioner of Public Works of the City."

The Goodrich Transit Company is engaged in carrying freight and passengers by water. It has many steamships. Only an insignificant part of its business consists of bulk freight and interchange freight or passenger traffic between itself and the two railroads mentioned in the clause above quoted.

As shown by a document furnished by the Illinois Central Railroad, that company made a lease to Goodrich Transit Company, November 3, 1920, for part of the area mentioned in the ordinance, from the 1st day of May, 1920, to January 1, 1923. In the last mentioned date it renewed this lease for one year. The Goodrich Transit Company is still in possession. As the Illinois Central accepted the Lake Front Ordinance, February 18, 1920, the subsequent lease

and renewal to Goodrich Transit Company violate the provision of the ordinance. The City has not consented to the renewal by ordinance.

The Michigan Central Railroad leased to Goodrich Transit Company from September 1, 1910, part of the area embraced in the ordinance for five years and has allowed the lease to be renewed from year to year since that time. Every renewal since February 18, 1920, is in violation of the terms of the ordinance.

I believe both railroads can be compelled to cancel their leases with the Goodrich Transit Company. Both leases contain cancellation clauses.

Yours respectfully,

DANIEL V. GALLERY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Cigarette Licenses for Different Locations in Same Building.

February 29, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

Your letter of recent date asks us for an opinion as to whether a druggist who also runs the cigar stand in the lobby of the same building is required to take out a cigarette license for each of the two places, or whether one will suffice to cover both places. You state that in this particular place the Lotus Drug Co. has several entrances to the corridor of the building at 166 West Jackson boulevard, and that one of these is almost directly opposite the lobby cigar stand operated by it.

Under the peculiar conditions named it seems like applying a very harsh rule to say that because the lobby stand is open to the public without the necessity of entering upon the premises of the drug store and that there is no direct connection between the two places, therefore they must be regarded as separate places. Yet that seems to be the rule in such a case. In fact, if it were not the rule, how would it be possible to draw the line? In the case of large buildings there might be three or four cigar stores under one roof, yet so distinct from each other that no one would suspect any connection. An exception might be made in this instance because the stand is in a room or lobby connecting directly with the store and is so near to the main business that the general superintendence of the main business necessarily includes surveillance of the cigar stand.

In the case of *Malkan v. City of Chicago*, 217 Ill. 471, the owner of the two saloons operated one in the basement and another on the first floor. When the license was taken out there was no inside connection between the places, but before the case got into court there was a stairway built which connected the two places. The court held that there were two saloons. This case is not as satisfactory as it might be, because the court does not indicate what it would have done if there had been inside connection between the two places at the time the license was applied for. Nevertheless, the *Malkan* case seems to hinge on the very point that is made in this case, where the two places are separated by a lobby open to the public and for all purposes of segregation the same as a street.

Our position with respect to such a division of activity in the sale of cigarettes by one licensee is that if he has rooms that directly connect with each other no separate license will be required, otherwise there must be separate licenses. It might be said in this instance that the rooms do connect with each other, even though there is more or less a public place between the two places.

In a recent opinion given to the License Department we held that a "place," as the word is used in the ordinance,

saying that a cigarette license authorizes the licensee to sell cigarettes, etc., "at the place designated therein," does not mean necessarily that only one spot in a store or a building can be used for such purpose. A department store sometimes covers a whole block, but a cigarette license will authorize the sale of same throughout the store.

The case before us is somewhat different, as already pointed out, and it may be establishing a troublesome precedent to hold that you can regard this as an exceptional case where the close proximity of the two places and easy accessibility to each other under the same roof overcomes the regular rule that in order to be considered one "place" the two rooms must be directly connected with each other and included in one letting as "premises" to be occupied for one general purpose. Nevertheless, we recommend that you so regard this particular case, bearing in mind that the general rule applies except under the extraordinary circumstances named.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Tax Certificates From 1921 Sale for Delinquent Special Assessments.

February 29, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have the letter of the City's Real Estate Agent in which he inquires whether it will be sufficient protection to preserve the city's lien on purchases made at the sale for delinquent special assessments for the year 1921, if he files the evidence of the certificate of sale in the manner provided for by Section 225 of the Revenue Act.

It is our opinion that the city's lien will be preserved under the provision in question. It was, in fact, passed by the General Assembly in response to the request of the city's representative, who caused it to be introduced for passage.

As Section 225 now reads, holders of certificates of sale which have ripened so that deeds may be demanded must take out such deeds within the year, as before, except in the case of a city, village or town containing more than 200,000 inhabitants which has acquired such certificates on sale for taxes or special assessments in which it is interested. In such case the municipality may preserve its lien by recording the certificate or evidence of it in the form prescribed, and in the case of property registered under the Torrens Act by registering such certificate or evidence thereof with the registrar.

We therefore recommend that the certificates or evidence thereof in the form prescribed be filed for record, thereby avoiding the necessity of taking out deeds.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Transfer of Deposit for Sidewalk Construction.

February 29, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your letter of recent date relative to the proposed transfer of a deposit made by the Acme Concrete Construction Co. You ask whether you can properly make such transfer, and request us to draw a form for that purpose.

You state that this company has a deposit of \$200 with the Comptroller "for sidewalk construction," that it is going

out of business as sidewalk builder, but will continue to do business as a corporation under the name of Acme Mosaic Terrazzo Co., Inc., and that it desires to have its deposit transferred to the credit of the latter company.

While you do not state the specific purpose of the deposit, we assume that it was placed in your hands under the provisions of Paragraph (c) of Section 3573 of The Chicago Municipal Code of 1922, and is intended only as a deposit on account of inspection. The paragraph mentioned says that the applicant for a permit to build a cement or concrete sidewalk shall deposit \$50 with the bureau of water on account of use of water, and another \$50 with the Comptroller on account of inspection. You do not state why this contractor deposited \$200 instead of \$50, but probably it is because it makes several applications at one time.

The deposits thus required are subject to recall by the applicant who deposited them at any time, subject to the charges which have accrued or are likely to accrue. If the job or jobs are finished and inspected, the inspection fees should be taken out of the deposit, and the balance may be returned to the contractor. In this respect it is unlike the bond required by the same section of the code, which must be retained because there may be liability thereunder at some time in the future.

We recommend, therefore, that if a party desires to switch the deposit from one corporation to another, the proper procedure will be to ascertain what, if any, inspection charges there will be against the deposit, and then to transfer only such portion of same as remains after such inspection fees are paid therefrom.

We have prepared a short form of transfer which may be used for that purpose, and we submit same herewith.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Special Assessments Levied Against Public Library.

March 3, 1924.

HARRY S. WILSON, Esq., Secretary, The Chicago Public Library.

Dear Sir:

Your letter in reference to special assessments levied against the Chicago Public Library was referred to the undersigned for consideration and reply.

The question you ask is as follows: "Is the payment of bills for special assessments for street improvements a proper expenditure of taxes collected for library purposes and placed to the credit of the Public Library Fund?"

The answer to this question depends on the validity of the assessment against the Library property. If the assessment is a valid assessment and the Library is not exempt therefrom, it follows that the payment is a necessary expense payable out of the Library fund. It stands on the same footing as interest or any other item of expense which is not paid for salaries or books or for building or maintenance purposes, but is nevertheless a library expense. The validity of the assessment in turn depends on whether the assessment is one levied by the City or by one of the park boards. An assessment levied by the City is collectible against City property. If levied by another municipality it cannot be collected.

We find that as far back as 1857 the Supreme Court explicitly declared that property of a city was subject to special assessment. (*Higgins v. City of Chicago*, 18 Ill. 276.) Later, it was held with respect to the very land on which the Library building stands, that it was subject to a special assessment for improving Michigan avenue, and affirmed the principle laid down in the case we first cite, as it has been affirmed repeatedly since. (*Scammon v. City of Chicago*, 42 Ill. 192.)

The Supreme Court has held, however, that the City cannot levy an assessment on park property. The case of

West Park Commissioners v. City of Chicago, 152 Ill. 392, very fully discusses the reasons for its conclusion, and while there seems to be an inconsistency in the reasoning which makes the decision far from satisfactory, we are unable to find that the Supreme Court has ever receded from the position it took therein. We are therefore bound by it. The court holds that because the two municipalities are both given power to make street improvements it would be a conflict or an overlapping of powers if the two municipalities are given the same power over the same territory. The unsatisfactory part of the decision is that the court seems to regard the park property as the only thing within the park district.

Nevertheless, the law is clearly laid down that the City cannot spread an assessment on park property. It follows, of course, that where the two municipalities are reversed, by the same rule the reverse is true, and the park district cannot levy a special assessment on the City.

The Public Library property is City property, and is therefore subject to the City's special assessments for street improvements.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Claim of Real Estate Expert for Service as Traffic Expert on the Michigan Boulevard Improvement.

March 3, 1924.

HON. ROSS A. WOODHULL,
Chairman, Committee on Finance.

Dear Sir:

This is in reply to your letter of November 2, 1923, requesting an opinion from this office as to the City's liability

to pay the claim of William P. J. Halley for \$1,250 alleged to be due him for services, at the rate of \$50 per day, as a traffic expert on the Michigan boulevard improvement, which services are alleged to have been performed in the month of December, 1919.

As we understand from the correspondence submitted, this claim has not been paid because of the fact that Halley's name was carried on the Corporation Counsel's payroll for the same period, although subsequently the records were corrected to show his resignation as an Assistant Corporation Counsel on December 1, 1919, and the checks issued in payment of his salary as such for the month of December were subsequently cancelled.

We are of the opinion that the matter of the claimant's name having appeared on the Corporation Counsel's payroll is of no especial materiality, inasmuch as it seems to be generally conceded that he was not in fact paid as an attache of that office for the period in question. Moreover, we are aware of no statute or ordinance that prohibits a person holding more than one position at a time, assuming, of course, that he performs the services he was engaged to perform in each position.

Nevertheless, we are of the opinion that the claim should be disallowed and the claimant left to his legal remedy, if any, to collect the amount alleged to be due. In the matter of a similar claim made by the same claimant for similar services alleged to have been performed in the month of March, 1920, President John J. Sloan of the Board of Local Improvements, reported to your committee, under date of May 21, 1923, that an investigation of the records disclosed that the bulk of the work for which Halley claimed payment was performed by someone else, and that he was not called to testify as a traffic expert in any of the matters on which he was presumably engaged.

There is nothing in any of the papers or records submitted to us, or which we have examined, that establishes a proper and lawful employment by the Board of Local Im-

provements, nor is there anything to indicate that the work for which payment is claimed was actually performed by Mr. Halley. We do not wish to be understood as stating that he was not lawfully employed or that he did not actually perform the services in question, but merely that we are unable to determine from existing available records what the facts really are. In this state of the case, it is our opinion that the claim should be disallowed, and the claimant given the opportunity of pursuing his legal remedy, if any, which, we understand, has been done in the matter of his other claim herein referred to.

Very truly yours,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Appointments by Board of Education Are Not Subject
to Statutory Provisions Governing Appoint-
ment to City Offices.**

March 4, 1924.

TO THE HONORABLE, THE MAYOR AND CITY COUNCIL OF THE
CITY OF CHICAGO.

Gentlemen:

Pursuant to an order passed by your Honorable Body on February 13, 1924, C. P. P. 1864, directing the Corporation Counsel to submit an opinion to the City Council as to whether or not the provisions of Article 1349, Chapter 24, of the Cities and Villages Act, relative to the eligibility of persons for public office in cities in the State of Illinois of

over 200,000 population, apply to the offices of Superintendent of Schools and Supervisor of Playgrounds, we call your attention to the fact that there is no such article as the one you designate. Assuming, however, that you desire information as to whether the City's Civil Service Act applies to the positions you mention, we beg leave to say that the School Act, Chapter 122, under and by which all school appointments can be made, reads, in part, as follows:

"151. Appointment—Term—Vacancies—Eligibility.) Section 128. Each city having a population exceeding 100,000 inhabitants shall constitute one school district which shall maintain a thorough and efficient system of free schools, which shall be under the charge of a board of education, which shall be a body politic and corporate, by the name of 'Board of Education, City of,' and by that name may sue and be sued in all courts and places where judicial proceedings are had."

The Board of Education being a body politic and corporate, is thereby constituted as a separate and distinct entity recognized in law and in fact, and cannot possibly be affected by any sections contained in the Cities and Villages Act, which relates only to cities and villages.

The Cities and Villages Act does not apply to the Board of Education of Chicago in its appointment of Superintendent of Schools, Supervisor of Playgrounds, or other officers whose appointment is designated by law to be made by the Board of Education.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Residents in Locality Benefited Cannot be Required to
Pay for Rearrangement of Fire Alarm
and Police Boxes.**

March 4, 1924.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

In reply to your letter of February 15th last requesting an opinion from this office "as to whether or not the City would be within its rights in compelling the Stock Yards people to bear the expense involved" in the rearrangement and relocation of fire alarm and police telegraph equipment in the stock yards, we beg to inform that it is our opinion that the people who would benefit thereby cannot be compelled to pay the expense of such rearrangement.

In providing police and fire protection the City does so not by virtue of any implied or express contractual relationship with the beneficiaries, but solely in its governmental capacity, and the only funds available for such purposes are such as are raised by ordinary revenue measures. The City is under no legal obligation to furnish this protection and is not liable or responsible for a failure to do so. The protection of all buildings in the city from destruction or injury by fire (and the same is true of police protection) is for the benefit of all the inhabitants and for their relief from a common danger. The exercise of this function is governmental in character and purely discretionary, and is, we think, so impressed with a general public interest as to be repugnant to the idea of levying a direct assessment for that purpose on a particular group to be benefited. However, inasmuch as the City is under no legal obligation to furnish the service, it may elect not to do so unless the beneficiaries agree to pay the expense of installation or maintenance or both, but the City may not of its own motion make the sug-

gested changes and compel the particular group of people in question to pay the cost of same.

We are returning herewith the papers you transmitted with your request, except your letter, which we have retained for our files.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Special Assessments May Not be Levied Against Lincoln Park Commissioners.

March 4, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

Some time ago you wrote us concerning the claim of the City of Chicago against the Lincoln Park Commissioners on account of an unpaid special assessment due on Warrant No. 40277, work done by Parker-Washington Company, consisting of the paving with asphalt of Chicago avenue from Lincoln Parkway to the Lake Shore Drive. You asked whether this item and similar items were collectible if the Lincoln Park Board refused to pay, and if so, what procedure should be followed. You stated that you gave us this specific item for the purpose of furnishing a definite basis to work from.

Since that letter was written you turned over a tabulation showing all your claims of a similar nature, indicating that there is a considerable amount due, and you again put the same questions, particularly asking whether these claims are collectible "from a practical standpoint." We will endeavor to answer both of the letters in this opinion.

There appears to be no authority on the part of the City of Chicago to levy assessments on the large park boards. This is due not to the fact that they are separate governmental authorities, but to the fact that our Supreme Court has held that both the City and the Park Board which is given power to levy assessments for the improvement of streets, have powers of the same kind that would conflict if one did not end where the other began.

The case of *West Park Commissioners v. City of Chicago*, 152 Ill. 392, was brought as a test case for the purpose of settling what had before that time been a much mooted question. The court went into the question very fully. In order to explain the decision, as well as our position with respect thereto, we will quote freely from its opinion.

The court says, on page 401 :

“In view of these various statutory provisions, it is perfectly plain that the West Chicago Park Commissioners are a municipal corporation, created for the purpose of laying out, establishing, improving and maintaining certain parks, boulevards and ways within the territorial limits of the City of Chicago, and that it is given full and exclusive power and authority, not only to lay out and improve, but also to govern, regulate, manage, control and direct the same, and that its power and authority in all these respects are plenary, and exclusive of that of the City of Chicago.”

It is then shown that for the purposes for which it is created this municipal corporation—the park board—stands on an equal footing with the City. Again, on page 406, the court says :

“It follows that the power of the park board over all these parks, boulevards and streets, for the purposes prescribed by these statutes, is plenary, while that of the city is wholly excluded. And this exclusion, so far as it relates to any power on the part of the city to govern, manage, control or interfere with these parks, boulevards and streets as such, is as complete as it would have been if the parks, boulevards and streets had been wholly withdrawn from the territorial limits of the city. Indeed, the legal effect of the various park acts would

seem to be to take them out of the territorial jurisdiction of the city, so that, so far as the power of the city in relation to them is concerned, the corporate organization of the city is practically dissolved."

The court then stresses the conflict of authority, stating among other things, however, that it is not unmindful of the fact that, by its repeated decisions, the rule is well established that public grounds, such as parks, owned by a municipal corporation, are liable to assessment for street improvements. The following then appears on page 409:

"The view we are disposed to take in the present case is, not that the parks under the control of the West Chicago Park Commissioners are exempt from assessment, by the proper municipal authority, for local street improvements, any more than are other public grounds, but only that, by the park acts, jurisdiction to make such assessments is withdrawn from the City of Chicago, the parks being, by force of those acts, for all street purposes, taken out of the territorial limits of the city and placed within the exclusive jurisdiction of the park board."

The court then justifies the conclusion it has reached by saying that it is neither inequitable nor out of harmony with the spirit and intention of the park acts to have the whole city pay the share which would otherwise be assessed against the park board.

The above case has not been reversed. The rule laid down was reiterated in *Billings v. City of Chicago*, 167 Ill. 337, again in *West Chicago Park Commrs. v. Farber*, 171 Ill. 146, and in other cases. It must be regarded as the settled law in this state until it is changed by express statute.

Without intending any disrespect for the opinion of the Supreme Court, it has always seemed to the writer that there is a flaw in the argument it makes. That is, that the court seems to regard the parks and boulevards in the light of a district, which ends where the territory of the City begins, whereas the two municipalities in fact overlap each other, one being superimposed on the other. The consequence is that

when the City levies a special assessment within the park district it imposes it on the people of that municipality, and when the park district does it the assessment is imposed on the people of the city. We are not called upon to argue this out, however, and simply state it so that it will be seen that this can be changed by law in case the legislature should see fit to change the status.

We understand that a great deal has been accomplished by agreement in the way of overcoming the inequitable results that have arisen from time to time. We recommend that this policy of taking up the question of the equities in such cases with the various park boards be continued in the future, but see no way in which the boards can be made to pay if they do not desire to do so.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Power of City to Compel Chicago, Milwaukee & St. Paul
Railway Co. to Construct Subway at
Wrightwood Avenue.**

March 7, 1924.

HON. FRANK J. TOMCZAK, Alderman, 39th Ward.

Dear Alderman:

We have your communication of recent date with reference to the proposition whether or not the City can compel the Chicago, Milwaukee and St. Paul Railway Company to build a subway under its railroad crossing at Wrightwood avenue.

The ordinance requiring the elevation of the roadbed of tracks, passed February 21, 1898, C. P. P. 1722, included the construction of a subway at the location you refer to, with however, this limitation:

“Provided, however, that the said Chicago, Milwaukee and St. Paul Railway Company shall not be required to construct any part of this subway or to provide any opening whatever of this street across or through its proposed elevated embankment or structure, as required by the terms of this ordinance, until such time as the land necessary for a continuous street 66 feet in width for at least one-quarter mile in length upon each side of the right of way of said railway company, shall have been properly dedicated or condemned for public street purposes, and said street shall have been graded or otherwise properly prepared for general use of the public.”

The City has never fulfilled this requirement, but it is evident that several attempts were made to do so. On one occasion, April 26, 1916, an ordinance was passed opening and widening Wrightwood avenue from Crawford avenue to North Keeler avenue. All matters affecting the opening and widening of streets necessarily come within the powers of the Board of Local Improvements, and if after you study the situation further, you wish to follow it up, we suggest that an order be passed directing the Board of Local Improvements to proceed in accordance with the provisions outlined in the track elevation ordinance.

Your letter contains a paragraph in which you express the belief that Wrightwood avenue should be taken over by the Park Commissioners and be made a boulevard extension of Logan boulevard.

The *modus operandi* to perfect this would be to have the City Council pass a “consent” ordinance giving the right to the Board of West Chicago Park Commissioners to take, regulate, improve, control and govern that portion of Wrightwood avenue which you believe should be made into a boulevard. The Board can then accept or reject such ordinance usually within a period of six months.

Very truly yours,

JAY A. SCHILLER,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Permit for Open Parking Space Within Two Hundred Feet of a Church.

March 7, 1924.

HON. GUY GUERNSEY,

Chairman, Committee on Harbors, Wharves and Bridges.

Dear Sir:

We have your letter of December 19, 1923, requesting an opinion from this office as to whether there is any legal objection, under the ordinances, to the issuance of permits to operate open parking spaces at 60-64 East Ninth street, and at the northwest corner of Clark and Polk streets, both of which sites are within two hundred feet of a church. We submit the following:

Art. 2, Ch. 11, of the 1922 Code, which is authority for the issuance of such permits, defines garages as follows:

“242. *Public garage defined.*) The words ‘public garage’ as used in this article shall be held to mean and are hereby defined as meaning any building, structure, *premises, enclosure or other place* (except a public thoroughfare) within the city, where two or more automobiles, autocars or any similar self-propelled vehicles are stored or parked in a condition ready for use or are stored or parked for repairs or service; provided, however, that this shall not be deemed to include or to mean any building, structure, premises, enclosure or other place which is hereinafter defined as a private garage.” (Italics ours.)

That this section embraces the sites mentioned in your letter is too readily apparent to necessitate any discussion or explanation.

By Section 246, Art. 2, Ch. 11, it is provided:

“No person, firm or corporation shall locate, build, construct or maintain any public garage within two hundred feet of any building used as and for a hospital,

church or public or parochial school or the grounds thereof, nor shall any person, firm or corporation locate, build, construct or maintain any public garage in the city on any lot in any block in which two-thirds of the buildings on both sides of the streets are used exclusively for residence purposes, or within one hundred feet of any such street in any such block, without the written consent of a majority of the property owners according to frontage on both sides of the street, etc."

We are of the opinion that school and church buildings are not affected by the proviso in this section concerning frontage consents, but think that applies only to the portion of the section concerning residential streets. The section could have been more artfully drawn to make the distinction more pronounced, but it is clear to us that it contains two separate and distinct provisions and that the first part, viz.: that relating to schools and churches, is complete in itself and was so intended to be without any reference to the rest of the section. After a careful consideration of this section we do not see how it can bear any other construction. It would follow, therefore, in the present state of the law that a permit cannot lawfully be issued.

This appears to be one of those cases where the general public interest might best be subserved by the breach rather than the observance of the ordinance in question, especially in view of the traffic conditions in the localities mentioned. The ordinance is penal and a special permit could not legally be granted so long as it remains in its present form. The only relief we can suggest is a re-draft of or amendment to the ordinance making a reasonable classification of the various sections of the City and prescribing regulations and restrictions that will best serve the public interest and requirements of each.

Yours very truly,

JAMES J. COUGHLIN,

Approved:

Assistant Corporation Counsel.

EDMOND L. MULCAHY,

Acting Corporation Counsel.

Interpretation of Zoning Ordinance.

March 10, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

I beg to acknowledge receipt of your letter of February 28, 1924, asking for the proper interpretation of certain paragraphs of the Chicago Zoning Ordinance.

At the outset I think it advisable to direct your attention to Section 1 of the Zoning Ordinance which reads as follows:

"Interpretation: Purpose. In interpreting and applying the provisions of this ordinance such provisions shall in every instance be held to be the minimum requirements adopted for the promotion of the public health, safety, comfort, morals or welfare."

The above section should at all times be kept in mind in construing the various provisions of the ordinance.

Your letter quotes Paragraph "M" of Section 2 of the ordinance, but before coming to said Paragraph "M," we find in Section 2 the following:

"Definitions. Certain words in this ordinance are defined for the purposes thereof (unless there is express provision excluding such construction or the subject-matter or context is repugnant thereto) as follows:

Paragraph "M" of said Section 2 reads as follows:

"Lot—A parcel of land or premises occupied, or which it is contemplated shall be occupied, by one building with its usual auxiliary buildings or uses customarily incident to it, including such open spaces as are required by this ordinance and such open spaces as are arranged and designed to be used in connection with such building, shall be deemed a lot for the purposes of this ordinance. A corner lot shall be deemed to be that property which has an area not in excess of 8,000 square feet, and which abuts on two streets making an angle on the lot side of not greater than 120 degrees."

The first sentence of said Section "M," Paragraph 2, containing the definition of a lot, is self-explanatory and needs no elaboration.

The last sentence of Paragraph "M," Section 2, defines a corner lot. The purpose of the City Council in limiting the area of a corner lot is apparent. In the matter of amount of area a building may occupy on a lot, and in the matter of the volume of the building to be constructed thereon more latitude is allowed and rightly so to the owner of a corner lot up to the 8,000 square feet which the ordinance defines as the maximum area of a corner lot for the purpose of the ordinance.

In cases, however, where a lot is greater in area than 8,000 square feet and abuts on two intersecting streets at their intersection, what is the situation as regards allowable area and volume?

Paragraph "K," Section 21, reads as follows:

"Where a lot greater in area than 8,000 square feet, located in a Residence or Apartment district abuts on two intersecting streets at their intersection, the area and volume of the building as permitted by this ordinance may be distributed over the lot."

The above paragraph, in my judgment, was clearly intended to cover the situation where a lot is situated on a corner and has a greater area than 8,000 square feet. The owner of such a parcel of land may clearly distribute or spread his allowable area and volume upon the said parcel of ground. Because the ordinance by definition limits a corner lot in area to 8,000 square feet does not in any sense mean that an owner of a parcel of land on a corner which contains more than 8,000 square feet must so utilize the said 8,000 square feet on the corner as though he did not own at all the property adjacent to it.

In my opinion the owner of a lot greater in area than 8,000 square feet located in a residence or apartment district which abuts on two intersecting streets at their intersection may distribute or spread his allowable volume and

area over his entire lot as he sees fit in accord with the provisions of the ordinance. He can place more of his volume and area on the 8,000 square feet on the corner or he can place less, so long as the total of the said area and volume of his entire lot (including the 8,000 square feet on the corner) does not exceed that prescribed by the ordinance.

To hold otherwise would mean a strained construction of the provisions enumerated in the ordinance and a construction which I do not believe could be sustained.

Yours very truly,

WM. L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Authority of Northwestern Elevated Railroad Company
to Maintain Ravenswood Branch from Western
Avenue to Kimball Avenue.**

March 13, 1924.

HON. U. S. SCHWARTZ,

Chairman, Local Transportation Committee.

Dear Sir:

Replying to your letter of the 25th ult, in which you inquire by what authority the Northwestern Elevated Railroad Company maintains and operates the portion of its Ravenswood branch from Western avenue to Kimball avenue, we beg leave to report that at the time the said company obtained its right of way between said points no streets or alleys had been opened or dedicated to public use across the line of said right of way. The ordinance of January 16, 1905, authorizing the construction of the Ravenswood branch gave to the company the right to construct its line

across the streets and public places to a point fifty feet west of said Western avenue; the last street then opened which would be crossed by the line and the company had the right to further extend its line on a private right of way without ordinance authority. The subsequent opening of streets across the right of way of the company did not make further ordinance grants necessary.

Respectfully submitted,

C. M. DOTY,

Approved: *Assistant Corporation Counsel.*

EDMOND L. MULCAHY,

Acting Corporation Counsel.

**Requirement That Bonds Purchased by the Retirement
Board of Policemen's Annuity and
Benefit Fund be Registered.**

March 14, 1924.

TO THE RETIREMENT BOARD OF THE
POLICEMEN'S ANNUITY AND BENEFIT FUND.

Gentlemen:

In response to your request, I herewith submit an opinion as to the interpretation to be placed upon the last sentence in Paragraph "E" of Section 6 of the Policemen's Annuity and Benefit Fund Act, to wit:

"Any bond purchased by the said Retirement Board shall be registered in the name of the Annuity and Benefit Fund herein provided for."

Paragraph "E" of Section 6 makes it the duty of the Retirement Board to invest the moneys of said Annuity and Benefit Fund in interest bearing bonds of the United States, or of the State of Illinois, or of any County of the State of Illinois, or of any city, village, incorporated town, municipal corporation or school district in said State, or in any special assessment bonds issued by any city, village or incorporated town in Illinois, under and by virtue of the "Act concerning

local improvements" in force July 1, 1897, as subsequently amended.

The requirement of Paragraph "E" of Section 6 that all bonds shall be registered, can only refer to and does refer to registerable bonds. The law does not require impossible things, and where two provisions of an act, or of one section of an act, are in apparent conflict, the act, or section, is to be so interpreted as to give sensible and intelligent meaning to every provision or requirement so far as possible.

I am, therefore, of the opinion that the Retirement Board is wholly within its rights, and is properly performing its duties as to investigating the moneys of the Annuity and Benefit Fund, when the Board invests such funds in interest bearing bonds of the kind designated in Paragraph "E" of Section 6, so long as the Board registers these bonds which can be registered as required in the sentence above quoted.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

EDMOND L. MULCAHY,

Acting Corporation Counsel.

Change of Passenger Fares During 1923 on the Chicago, Lake Shore and South Bend Railway Co.

March 15, 1924

HON. U. S. SCHWARTZ,

Chairman, Local Transportation Committee.

Dear Sir:

We beg leave herein to reply to your communication dated January 3, 1924, in which you refer to an order, previously transmitted to this office, directing an inquiry into

the change of passenger fares during 1923 on the lines of the "South Shore Interurban Railroad" between Kensington and Hegewisch.

We think the title "South Shore Interurban Railroad" must be erroneous as we have been unable to learn anything of a line of railroad using that corporate name. However, the Chicago, Lake Shore and South Bend Railway Company, operates an electrical interurban railroad from Kensington, Illinois, through Hegewisch, Burnham and other towns in Illinois to South Bend, Indiana, commonly known as the "South Shore Lines" and we think this must be the railroad referred to.

The passenger business of said company is the most important part of its business and includes both interstate and intrastate business. The company is, therefore, under the jurisdiction of the Interstate Commerce Commission in respect to its interstate business and also in respect to the relation and effect of its intrastate business, rates and service upon interstate commerce. It has been decided many times by the Supreme Court of the United States that the Interstate Commerce Commission may compel a revision of the intrastate rates of an interstate carrier regardless of the statutes and regulations of the state or local authority concerned if the standard of intrastate rates theretofore maintained by such carrier is unduly preferential to intrastate traffic and unduly prejudicial to interstate traffic and unjustly discriminatory against interstate commerce.

Until April 12, 1923, the Chicago, Lake Shore and South Bend Railway Company maintained a standard of intrastate passenger fares not exceeding the rate of two cents per mile fixed by the statutes of Illinois although interstate passenger rates had been increased to 3.6 cents per mile in accordance with an order of the Interstate Commerce Commission effective September 20, 1920. Said order increased the interstate passenger rates of all electrical interurban lines in the group of states called the "Eastern Group," in which Illinois is included.

This difference between interstate and intrastate rates led to an investigation by the Interstate Commerce Commission which on January 16, 1923, returned a report containing the following language relevant to the matter we are considering:

"We find with respect to the Chicago, Lake Shore & South Bend Railway Company that there are no conditions affecting transportation within Illinois which justify the maintenance by it of lower bases of standard and commutation intrastate passenger fares than the like fares contemporaneously maintained by said respondent and applicable to the interstate transportation of passengers to, from, or through the State; that the standard and commutation interstate fares of said respondent now in effect are reasonable; and that the failure of respondent to increase its intrastate fares, within the State of Illinois, to equal its respective interstate fares for corresponding distances has resulted, and will result, in intrastate fares lower than the corresponding interstate fares, in undue preference of persons traveling in intrastate commerce in Illinois, and in subjecting persons traveling in interstate commerce to, from, or through the State to undue prejudice and disadvantage, and in unjustly discriminating against interstate commerce.

We further find that, to remove the undue preference and prejudice and unjust discrimination found to exist, respondent should make such increases in its standard and commutation intrastate fares, applicable within the State of Illinois, as will result in such fares as shall not be less than the like fares of said respondent for corresponding distances, respectively, now in effect, for the transportation of passengers in interstate commerce upon its lines within the State of Illinois and between points in the State of Illinois and points in the State of Indiana."

On the same day, an order was entered requiring the company

"* * * to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said supplemental report to exist, and to establish, put in force, and maintain standard and commutation fares for the transportation of passen-

gers in intrastate commerce within the State of Illinois which shall not be less than its like fares for corresponding distances, now in effect, for the transportation of passengers in interstate commerce upon its lines within the State of Illinois and between points in the State of Illinois and points in the State of Indiana."

Said order was to become effective April 12, 1923, and the change of intrastate fares on the lines of the Chicago, Lake Shore and South Bend Railway Company became effective on the same date and in compliance with said order.

Respectfully submitted,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right and Power of Land Owner to Compel Commonwealth Edison Co. to Relocate Poles and to Bear Expense of Same.

March 18, 1924.

HON. LEO J. WINIECKI, Commissioner of Public Service.

Dear Sir:

We have your letter of the 6th inst. concerning the matter of relocation of a pole and equipment of the Commonwealth Edison Company in the alley east of Cornell avenue and south of 54th street, in order to permit the erection of a fire escape on a building at the southeast corner of those streets. We note that the Edison Company is willing to make the change at the property owner's expense, but that the property owner is of the opinion that the change should be made without cost to himself. The question we are asked to

pass upon seems to be whether the Edison Company or the property owner should bear the cost.

The present Commonwealth Edison Company is a consolidation of what were formerly known as the Commonwealth Electric Company and the Western Edison Light Company. The latter company was granted a franchise in 1887 to construct and maintain its system of electrical conductors and transmitters, and electrical apparatus generally, in the streets and alleys of the City for a period of twenty-five years. The Commonwealth Electric Company's ordinance was passed in 1897 and gave the company practically the same grants and privileges as had been previously conferred on the Western Company, except the Commonwealth's grant was for fifty years.

On March 23, 1918, the City Council enacted the present ordinance of the Commonwealth Edison Company, by virtue of which ordinance that company succeeded to the franchise rights of the Commonwealth Electric Company and the Western Edison Light Company, and such rights and privileges as were theretofore enjoyed by those two companies passed to the Edison Company, and the same restrictions and limitations as were operative on the old companies are likewise operative on the present company. The Western Company's franchise expired in 1912 and was not renewed, so that the grant under which the Commonwealth Edison Company is at present operating is the ordinance of the Commonwealth Electric Company which expires in 1947.

Accordingly, we have examined all three of the above grants in an endeavor to ascertain whether in any of them the City has reserved to itself or anyone else the right or power to compel relocation of poles and equipment to conform to the comfort and convenience of abutting property owners, or for any other purpose. We find no such reservation of power in any of them, and in the absence of such provision, no such duty may be imposed upon the company unless some warrant for the exercise of this power may be found in established common law principles.

The grants contained in the ordinances mentioned conferred vested rights on the companies involved in and to the streets and alleys of the City according to the tenor and limitations of the grant. Such right is protected by the Federal Constitution and may not be destroyed. It is the law, however, that while the Edison Company has the right to use the streets and alleys in the manner prescribed, that right is subject to such regulation as a proper and reasonable exercise of the police power may require to regulate the business of the company so that its use of the streets shall not interfere with the rights of the citizens. (*Northwestern Telephone Exchange Co. v. Minneapolis*, 53 L. R. A. 175; *City of Chicago v. O'Connell*, 278 Ill. 591.) The exercise of this power affects the public and becomes a duty, the performance of which is obligatory on the City. The City could not, by the terms and conditions of the granting ordinances mentioned, deprive itself of this power, or relieve itself of this duty, nor could the company, by any contractual terms of the ordinances, exempt itself from the reasonable and proper control of the municipal authorities in matters affecting the public welfare, safety, comfort and convenience.

The case presented, therefore, resolves itself into the question whether the relocation of the pole and equipment involved is a matter affecting the public welfare, safety, comfort and convenience, and thus subject to a reasonable and proper exercise of the police power. We are constrained to believe that it is not. In the first place it does not appear to us that the matter, in the instant case, is affected with a public interest, or even subject to any reasonable classification that would justify an exercise of the police power. The use to be served by the relocation of the pole is a strictly private use. Secondly, in the construction of the building the owner must have had notice of the existence of the pole; he is charged with notice of the company's rights in the alley, and of the requirement of the ordinance concerning fire escapes, and it does not appear that the exercise of a proper judgment might not have resulted in such a construction as would not be hindered by the pole in its present posi-

tion. The police power may not be arbitrarily exercised, but it must appear that a question of public necessity or convenience is involved before such exercise may be said to be reasonable and proper. From a consideration of the facts in the case before us, we cannot say that such a situation exists. The police power of the City is the only power that we know of that could be invoked in a proper case of this nature, and where the facts are insufficient to justify its exercise it follows, of course, that the property owner is without a remedy to compel relocation at the expense of the company.

For your guidance in the future, it might be well to point out that in cases of this kind the question is largely one of fact, and should be determined in accordance with the principles above outlined.

In cases where electric light or telephone poles interfere with an abutter's right of ingress or egress, a somewhat different situation is presented, although still largely a question of fact. In such cases the right of the utility company is subject to the abutter's easement of ingress and egress, but even this right is subject to a reasonable interpretation. An abutter may not so construct his building as to arbitrarily cause the entrances or exits to be hindered by any existing poles, when such building might as easily and reasonably, and with the same degree of convenience, comfort, tenantability and likelihood of profit be constructed otherwise and in such manner as not to be damaged or rendered less valuable by the existence of any such poles.

In other words, an abutter may not deliberately cause damage or injury to himself or his property on the strength of a somewhat forlorn hope that the jurisdiction of the courts or the police power of the City may be invoked to cure a condition he has himself arbitrarily created. The remedy may be adequate, but the symptoms are not always sufficient to warrant its application.

In those cases, of a similar nature, deemed proper for the exercise of the police power, the appropriate procedure

would be a Council order demanding the removal or relocation of poles or equipment, and upon refusal of the company to comply with the order, a bill for injunction brought by the property owner, based on the Council order and the refusal of the company to comply with it, seeking to enjoin the continued maintenance of the apparatus or equipment at the place from which it was ordered removed.

Yours very truly,

J. J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Whether Pension Should be Paid a Police Pensioner
Who Re-enters City Service, but Not
in Police Service.**

March 18, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and Benefit Fund.

Dear Sir:

Replying to your inquiry for an opinion as to the employment of a pensioned policeman in a temporary position in the City government, not in the police department, I submit the following:

The Policemen's Annuity and Benefit Fund Act, in force June 29, 1921, provided that policemen on pension who may re-enter the service of the police department shall not be paid a pension during the period of such service. I find no specific provision relative to such pensioned policemen re-entering the service of the City in any department other than the police department.

It is, however, against public policy that a person being paid a specific annuity for his support by a municipality (upon the presumed ground of his inability to longer serve as an employe of the City in the department from which he is pensioned) should at the same time be paid a salary by the same municipality for services rendered or to be rendered by such a person in another department; and while there is no specific provision in the pension law governing a question of this kind, I am of the opinion that public policy would dictate either that no pensioner shall be placed upon the City payroll as an employe, or, that pension payments should be stopped during the period in which a pensioner may be drawing a salary from the municipality from which he has been receiving a pension, until a court of competent jurisdiction should otherwise direct.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Widow to Pension Who Married Pensioner After He Was Retired.

March 18, 1924.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity and
Benefit Fund.

Dear Sir:

Replying to your letter of March 13, 1924, as to the pension claim of Martha Zierke, I submit the following:

Your letter shows that Frederick C. Zierke, a pensioner, husband of Martha Zierke, died on March 1st (I presume in 1924); that Mr. Zierke had been placed on pension July 15,

1913; that he was married to Martha Zierke, the applicant, on December 21, 1920.

Frederick C. Zierke was placed on pension under the Act of 1887, as amended. On July 1, 1913, the Act of 1887, as amended, contained the following provision:

“Whenever any policeman of such city, village or town has been retired after twenty years’ service, or physically disabled, shall then marry, such wife or child or children of said marriage shall, after his death, receive no pension from said fund.”

This was the law at the time Frederick C. Zierke was put on pension. No amendment has been made and no new act passed which would now entitle his widow to a pension.

I am of the opinion that the applicant is not entitled to be granted a pension.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

City is Not Required to Furnish Water With Whatever Pressure and in Whatever Quantity the Consumer May Desire.

March 18, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of recent date, relative to the above mentioned subject together with inclosure of letter from the Sloan Valve Company and letter from the City’s general meter foreman and in answer will say that we have carefully examined the Smith-Hurd Illinois

Revised Statutes and The Chicago Municipal Code 1922 and from such examination we are of the opinion that in the absence of a contract the City of Chicago is not required to furnish water to a consumer in a specified quantity and at a specified pressure.

In "respect to the particular case of the Sloan Valve Company" we call your attention to Section 4139 of The Chicago Municipal Code of 1922, which reads as follows:

Section 4139. "Design, type and size of water meter, vaults, etc., to be approved by commissioner of public works—location directed.) Each water meter, proportional, indicating or recording device, including meters for domestic supply, for fire lines, submeters, or any other kind, which is connected or is to be connected with any pipe supplied by the Chicago waterworks system shall be of a type, design and size approved by the commissioner of public works."

From the foregoing we are of the opinion that it is discretionary with the commissioner of public works to furnish the type, design and size of any and all meters that may be used or required, on all service pipes.

Very truly yours,

THOS. W. FLYNN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Change of Title From "Bridge Tender" to "Electrical Bridge Operator"—Whether Another Civil Service Examination is Necessary.

March 20, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have before us a letter from the Harbor Master in which he makes inquiry concerning the propriety of a new

classification or title for the bridge tenders. He calls attention to the fact that the bridges are now electrically operated and that the title for that reason is not in keeping with the position, and that in other jurisdictions, such as the United States Government, the various railroads and in many cities, bridge tenders are now known as "Electrical Bridge Operators." The request has been made, on behalf of the International Brotherhood of Electrical Workers to change the title so that such operators may be re-classified as "Electrical Bridge Operators, Class E, Grade III."

In this connection a number of questions have been asked of us and we will answer them in the order in which they are asked.

The first is whether it is necessary for bridge tenders to take another examination if classified as electrical bridge operators.

In our opinion it will not be necessary to take a new examination if there is no change in the duties and if there are not now electrical bridge operators who have a different rank or grade. In other words, if it is merely a change of title, the duties remaining the same, the position continues as it now is. If, however, there is a shift of any kind, such as placing under the same title as other employes who are now in a distinct classification, or changing the rank or grade, then there would have to be a new examination.

The second question is whether such a re-classification would leave vacant approximately 300 positions in the Bureau of Rivers and Harbors now filled by bridge tenders.

This question is practically answered by our answer to the first question. The appropriation bill should be made to correspond with the positions, and when the position is called by a new name the old name is automatically dropped. The best method of proceeding so as to accomplish this without the difficulty that is apprehended, would be to change the code so that bridge tenders will no longer be called by that name in the code but will be called electrical bridge operators.

The last question is concerning the action that is necessary to be taken in order to have the title changed.

As indicated above, it will be necessary to amend The Chicago Municipal Code of 1922, and in addition thereto the appropriation bill should carry appropriations for electrical bridge operators instead of bridge tenders.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH;
Corporation Counsel.

Whether Oil Inspectors and Deputies Come Under the Civil Service Law.

March 21, 1924.

MR. WILLIAM F. FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

I beg to acknowledge receipt of your letter of the 5th instant asking for an opinion as to whether oil inspectors and deputy oil inspectors are subject to the provisions of the Civil Service Law.

The Oil Inspection Law of 1874 contains the following:

“* * * the mayor of any city, with the approval of the city council, shall appoint one or more inspectors for the inspection of contract,” etc. “Every such inspector shall hold his office for one year and until his successor is appointed and qualified, unless sooner removed from office. He may appoint deputies, for whom he shall be responsible, and who shall take the same oath and be liable to the same penalties as the inspector.”

2 S. & C. St., Ch. 104, Sec. 1, 1896.

The act was amended in 1911, by providing:

“Every such inspector shall hold office for one year and until his successor is qualified, *and with the approval of the power appointing him*, may appoint deputies for whom he shall be responsible, who shall take the same oath and be liable to the same penalties as the inspector.”

L. 1911, p. 432, Sec. 1.

Section 11 of the City Civil Service Act exempts “officers who are elected by the people or who are elected by the City Council pursuant to the City charter *or whose appointment is subject to confirmation by the City Council*.”

Section 12 of the Civil Service Act (bearing on removals from the service) provides “no officer or employe in the classified Civil Service * * * shall be removed, etc.” The distinction between “officer” and “employe” is thus clearly recognized.

In view of the fact, therefore, that the law provides that the oil inspector shall be appointed by the Mayor, “with the approval of the City Council,” and (as amended), further provides, that such oil inspector may, “with the approval of the power appointing him,” appoint deputies, I am constrained to hold that deputy oil inspectors must be deemed to be exempt from the operation of the Civil Service Law; especially if the appointments of these deputy oil inspectors have in fact been confirmed by the City Council.

The appointment of deputy oil inspectors would seem to be incomplete unless such appointments have been confirmed by the City Council.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

**Delinquent Assessment on Land Belonging to the
United States Government.**

Chicago, March 21, 1924.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

The City's Real Estate Agent has asked us whether it is necessary to secure Council action in order to accept the offer of the United States Government to pay the full amount of a special assessment that is delinquent, the City, however, to waive interest and costs. The assessment was for \$99.04; with costs and interest the total amounts to \$110.36.

We do not regard it as essential to secure authority to accept such an offer.

There does not appear to be any section of the statutes—in either the Revenue Act or the Local Improvement Act—which expressly exempts costs in such a case. The property of the United States Government is, however, exempt from taxation under Section 2 of the Revenue Act. Hence, there is no such thing as delinquency or sale for taxes under the Revenue Act for such property. Under the Local Improvement Act the procedure as to delinquency, sale, etc., is to be the same as under the Revenue Act. (See Secs. 65, 67, 71.) Since there can be no sale of such property under the Revenue Act, we believe you will be justified in accepting the amount of the assessment as levied and charging off the costs and interest that have accrued, and we see no reason for burdening the Council records with the matter.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

City May Not Grant Parking Concession on a Street to an Individual.

March 26, 1924.

HON. GEORGE M. MAYPOLE, Chairman, Sub-Committee on
Compensation, Committee on Finance.

Dear Sir:

We have your letter of March 19th requesting an opinion from this office as to the right of the City to grant a parking concession to a private individual for the space on the lower level of Michigan avenue between East Lake street and East South Water street, the concessionaire to charge a parking fee and to pay the City compensation for the concession.

After mature deliberation and consideration of the authorities, we have reached the conclusion that the City is without power or authority to grant such a permit. The permit would amount to an alienation of the street and a diversion from the public use to which all streets are dedicated. The primary and paramount object in establishing and maintaining streets and highways is for the purpose of public travel, and the public and individuals cannot be rightfully deprived of such use, "nor can the rights of the public therein be encroached upon by private individuals or corporations, even with the consent of the municipality." (13 R. C. L., p. 251.) *Field v. Borling*, 149 Ill. 556; *Smith v. McDowell*, 148 Ill. 51; *Stack v. E. St. Louis*, 85 Ill. 377; *Tacoma Safety Dep. Co. v. Chicago*, 247 Ill. 192. "Nor can the City convey to any person or corporation an exclusive right to the possession of any part of a street, or authorize any such person or corporation to appropriate a street or any part of it so as to exclude the general public from its free and unobstructed use." (13 R. C. L., p. 190.) *Sears v. Chicago*, 247 Ill. 204; *Quincy v. Jones*, 76 Ill. 231.

In *Field v. Barling*, 149 Ill. 556, *supra*, the court said (p. 565) :

“It will not be necessary to cite authorities in support of the proposition that a private individual cannot appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use.”

In that case the City passed an ordinance authorizing the construction of a bridge spanning an alley to connect two buildings of the licensee. The Supreme Court held that the City was without authority to pass the ordinance and said (p. 566) :

“Clause 7 of Section 62, Chapter 24, of the Revised Statutes, confers power on cities organized under the general Incorporation Act, as is the City of Chicago, to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharfs, parks and public grounds, and vacate the same. But there is nothing in this section of the statute, or in any other portion of the general Incorporation Act, which confers the power on the municipality to devote a street, or any part thereof, to a mere private use. * * * The fee of the street passed to the City of Chicago, but the City held the fee in trust for the public, and for no other purpose. *While the City had ample power to control, regulate and improve the street in such manner as the demands of the public required, the law conferred no authority on the City to devote the alley to private uses.*” (Italics ours.)

In *Smith v. McDowell*, 148 Ill. 51, the City passed an ordinance vacating a portion of a street for the purpose of allowing a private individual to use the vacated portion for a part of a building about to be constructed. It was held that the City had no power to devote the streets to that purpose, the court saying :

“The municipality in respect of its streets is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it.”

In *Alton v. Illinois Transportation Co.*, 12 Ill. 38, it was said:

“They (the streets) were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For these purposes the City may improve and control them and adopt all needful rules and regulations for their management and use, but she cannot alien or otherwise dispose of them. At most, she but holds them in trust for the benefit of the general public.”

In *Canal Co. v. Garrity*, 115 Ill. 155, it was said:

“It is not claimed that the use of the streets can be permanently granted for private purposes, and we recognize as unquestionable law that the use of the streets * * * must be for the public, and that no corporation or individual can acquire an exclusive right to their use, or to the use of any part of them, for private purposes.”

We have cited but a few of the available authorities, all holding in conformity with the above.

In support of a theory contrary to the views herein expressed, our attention has been informally directed to the fact that on numerous occasions the City Council has granted permits to persons and corporations to encumber and encroach upon the streets and alleys for a fixed period at a fixed rate of compensation. Without attempting to pass upon the validity of such permits, it may be stated generally that for private uses, not impressed with a public interest, the City may grant a permit to an abutter to temporarily obstruct or encroach upon a public highway for any purpose consistent with a reasonable use of the abutter's property, such as the storage of building material, etc., during the construction of a building, driveways, awnings, and the like, but such use must not be inconsistent with the public right in the street. In those cases where the City has granted permits for the use of the streets, e. g., to commercial houses, for the purpose of storing their merchandise or other purposes not embraced within the abutter's easement, so that in effect the licensee makes the street a part of his own property, we are very

firmly of the opinion that the City Council has exceeded its authority, and that such permits are *ultra vires* of the City.

In the matter of switch tracks constructed on or across public streets and serving private industries, our Supreme Court has held that such tracks are an integral part of the railroad and not of the industry. Thus they are impressed with a public interest and it is within the power of the City to grant such permits.

We have also examined a line of cases upholding the validity of leases and permits from municipalities to persons and corporations to conduct restaurants and similar concessions in public parks. There is a clear distinction between those cases and the instant case. The parks were laid out for public recreation and amusement and such concessions are entirely consistent with that object and materially add to the pleasurable facilities the park was designed to afford, and are not at all inconsistent with or violative of the public right or interest in and to the park.

It has been called to our attention, and therefore we discuss it, that the South Park Commissioners have set apart a space in Grant Park for parking, for which a nominal fee is charged, and watchman service is provided. A free parking space, however, is there also provided and persons desiring to avail themselves of Grant Park for parking purposes may do so without charge. We are informed that a suit is pending to determine the right of the Park Board to make the charge mentioned, and the outcome might be watched with interest. A charge might be made for any special service rendered, because the authorities are not required to furnish it, but we are of opinion that no one may be legally barred from the enclosure.

Moreover, in addition to the reasons above set forth, we believe that any permit the City might grant on the applications now in the hands of your sub-committee would be void as special legislation, inasmuch as it would impose liabilities and restrictions on a particular group or class not imposed on all others similarly situated.

Having reached the conclusion that the City Council may not lawfully grant the permit it will not be necessary to consider your inquiry concerning the liability of the City for loss or damage to cars parked in the space mentioned in the event that such a permit were granted.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Ordinances Repealed by the Zoning Ordinance.

March 27, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

I beg to acknowledge receipt of your letter of March 15, 1924, relative to the interpretation of Section 33 of the Zoning Ordinance.

Said Section 33 of the Zoning Ordinance is as follows:

“Effect on Present Ordinances. This ordinance shall not be construed as repealing or modifying any valid ordinances of the City of Chicago now in effect which restrict the location of industries, entertainments, occupations, establishments or enterprises of any kind, either by requiring frontage consents from property owners or residents affected by such location, or by prohibiting or restricting the location of same within a fixed distance from a hospital, church, public school or parochial school, or the grounds thereof, or on or near any class of streets or boulevards or any parks, playgrounds or bathing beaches. *As to all other ordinances or parts of ordinances in conflict with any of the provisions of this ordinance, the same are hereby repealed.”*

You wish to be particularly advised as to whether by the last sentence of Section 33 of the Zoning Ordinance the provisions of Section 642, Article IX, Chapter XVII of The Chicago Municipal Code are superseded or repealed.

Section 642, Article IX, Chapter XVII of The Chicago Municipal Code of 1922, hereafter referred to for convenience as Section 642, reads as follows:

"Percentage of area allowed to be covered.) No existing tenement house shall hereafter be enlarged, nor its lot be diminished, nor other buildings be placed on its lot, nor a tenement house be moved on a lot on which there is an existing building, so that after such change a larger proportion of any corner lot or other lot upon which it is situated is covered by buildings than the following proportions, respectively: no new tenement house alone or with other buildings now or hereafter erected shall occupy above the first story more than eighty-five per centum of the area of a corner lot; provided, that in the case of a fireproof building in which the windows of every habitable room open directly on a street, the portion of the lot covered may be ninety per centum of the area of said lot, subject to the requirement that a ten-foot space must be left above the first story opposite the lesser frontage; or more than ninety per centum of the area of such corner lot, if such corner lot is bounded on at least three sides by streets or alleys; or more than seventy-five per centum of the area of any other lot; except, that the space occupied by fire escapes, constructed and erected according to law and not more than four feet wide, shall be deemed unoccupied; provided, however, that in case of a lot, triangular or irregular in shape, bounded on two or more sides by a street, and having a number of lineal feet street frontage exceeding one-twentieth of the number of square feet in the area of such lot, it shall not be necessary to comply with the conditions of this section as to percentage of lot which may be covered."

Section 642 refers to the allowable proportion of a lot that may be covered by buildings where a tenement house is to be erected on said lot, and restricts the area to be so used to 85 per cent of the area of a corner lot, or 90 per cent of the area of such corner lot if same is bounded on three

sides by streets or alleys and 75 per cent of the area of any other lot.

By the provisions of the Zoning Ordinance the City of Chicago is divided into five classes of districts, "for the purpose of regulating and limiting the height and bulk of buildings hereafter to be erected, of regulating and limiting the intensity of the use of lot areas, * * * No building or part of a building shall be erected except in conformity with the regulations herein prescribed for the volume district in which said building is located."

This language is clear and unambiguous and unless something appears to the contrary, buildings which fall within the area provisions for the various volume districts must be governed thereby.

Section 642 you state was originally passed in December, 1902, and was later re-enacted as part of The Chicago Municipal Code of 1922. The Zoning Ordinance was passed on April 5, 1923, and its provisions, if there is a conflict, must take precedence over the provisions of said Section 642.

Section 16 of the Zoning Ordinance sets forth regulations applying to buildings to be constructed in 1st Volume Districts and among other things limits the area of a lot which a building may occupy to 50 per cent of an inside lot and 65 per cent of a corner lot, *except a building situated in a commercial or manufacturing district.*

There is a clear conflict here between the provisions of Section 642 and Section 16 of the Zoning Ordinance as to amount of area a tenement house may occupy in a Residence or Apartment District, and manifestly in such a case the provisions of Section 16 control. However, in said Section 16 there are no area restrictions as to a tenement house in a Commercial or Manufacturing District, and plainly in such a case the provisions of Section 642 would control as there is no conflict between it and the provisions of the Zoning Ordinance.

In the case of *N. Y. Central R. R. Co. v. Stevenson*, 277 Ill. 481, the court said in construing a statute, and the same reasoning would apply as to the construction of an ordinance:

“Where the effect of a later act is not to entirely abrogate a former one but merely to withdraw from the operation of the former act a portion of the cases included within its terms, leaving it in force as to cases not provided for by the later law, the result will be that the earlier act will be in part superseded by the effect of the provision of the later act. (*People v. Sweitzer*, 266 Ill. 459.)”

Section 17 of the Zoning Ordinance sets forth regulations applying to buildings to be constructed in a 2d Volume District and among other things limits the area of a lot which a building may occupy to 60 per cent of an inside lot and 75 per cent of a corner lot, *except a building situated in a commercial or manufacturing district.*

Here again we find there is a clear conflict between the provisions of Section 642 and Section 17 of the Zoning Ordinance, and by the same reasoning above recited the provisions of Section 17 must control as to the amount of area a tenement house may occupy in a Residence or Apartment District. In said Section 17, however, as in Section 16, there are no area restrictions as to a tenement house in a Commercial or Manufacturing District, and in such a case the provisions of Section 642 would control as there is no conflict between it and the provisions of the Zoning Ordinance.

Sections 18, 19 and 20 of the Zoning Ordinance set forth regulations applying to buildings in 3d Volume Districts, 4th Volume Districts and 5th Volume Districts, respectively, and among other things limit the amount of area a building may occupy in said districts, which are also located in Residence or Apartment Districts, to seventy-five per cent if an interior lot and to 90 per cent if a corner lot. Section 642 limits the area to be occupied by a tenement house to 75 per cent if an inside lot, 85 per cent if a corner lot and 90 per cent if a lot is bounded on three sides by streets or alleys. Should cases arise where there is a conflict between said Section 642 and said Sections 18, 19 and 20, my judgment is that said Sections 18, 19 and 20 would control and must be followed in such cases, as to tenements erected in Residence or Apartment Districts.

In said Sections 18, 19 and 20 of the Zoning Ordinance there are no area restrictions as to lots occupied by buildings in Commercial and Manufacturing Districts, and as to tenements erected in said districts, the provisions of Section 642 would apply as in said cases there would be no conflict between said Section 642 and the provisions of the Zoning Ordinance as to area.

I am in full agreement with your statement that the term "Apartment District" is a term of convenience, and that buildings permitted in an apartment district under the provisions of the Zoning Ordinance such as public libraries, museums, etc., are governed as to height, area of lot, volume, etc., by the terms of the Zoning Ordinance and not by the terms of the tenement house ordinance as they do not fall at all within the definition of a tenement house as set forth in the tenement house ordinance.

Yours very truly,

WM. L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Effects of Decedents Taken by Police Should be Turned
Over to the Coroner, Not the Police Custodian.**

March 27, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have requested an opinion from this office relative to the question of whether the effects of decedents should be turned over to the coroner or to the custodian of the police department. It is our opinion that all effects of decedents

should be turned over to the coroner as soon as received by the police and that they should not be given into the keeping of the custodian.

Section 20 of "An Act to revise the law in relation to coroners," approved February 6, 1874, in force July 1, 1874 (Chapter 31, Cahill's Revised Statutes, 1923), provides that the coroner shall take charge of all valuable personal property, money or papers which are found upon or near the body upon which any inquest is held.

Sections 3094-3096 of The Chicago Municipal Code of 1922 provide that the custodian shall have possession of all property seized or taken by the police, but this provision merely applies to lost or stolen property and does not apply to property taken from the bodies of decedents.

Very truly yours,

ALBERT H. VEEDER.

Assistant Corporation Counsel

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**City is Not Obligated to Pay Cost of Relocating Fire
Alarm and Police Cable to Make Way for
Installation of New Cable by Illinois
Bell Telephone Co.**

March 31, 1924.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

We have your letter of the 12th instant requesting this office for an opinion as to the liability of the City to pay the cost of relocating a conduit line in Crawford avenue that you have been "operating by the Fire Alarm and Police

Telegraph system cable, to make way for installation of a new cable by the Illinois Bell Telephone Company for their own use." We submit the following:

The Telephone Company's ordinance provides:

"The City of Chicago shall have the right to carry or string upon the top cross-arm on any of the company's poles or lines of poles, free of charge, wires for the telegraph and telephone system of the city. In lieu of the right to string wires upon the top cross-arm of the company's poles as aforesaid, the city shall have the right, free of charge, to the use of such space as may be necessary to contain said wires in one duct in each underground conduit of the company in every street or alley where the city has no available conduits of its own, or in lieu thereof, the company may furnish as many wires or conductors in the cables of said company as may be necessary for use for said telegraph and telephone system of the city."

It will be observed that there is no expression in this section of the ordinance that contemplates such a situation as your communication presents. Neither is there any other provision in the entire ordinance that takes cognizance of such a proposition. The ordinance imposes no direct obligation on the City to relocate its wires at its own expense to meet the convenience or requirements of the company. It remains to be considered, therefore, whether a reasonable interpretation of the section quoted, or a consideration of legal principles, apart from the ordinance, imposes such an obligation. It is our opinion that the City is not so obligated.

The ordinance establishes no limitation on the period of the City's right of occupancy of the space devoted to the City's use, and we think it follows as a necessary consequence that the right of the City to occupy the duct is co-equal to and concurrent with the right of the company to occupy the streets and alleys of the City and is, therefore, of the same duration. The ordinance provides that the City "shall have the right, free of charge, to the use of such space as may be necessary," etc. Having taken possession of the duct, and the company apparently acquiescing therein, it must be held that the space occupied is such as was "necessary" within

the meaning and contemplation of the ordinance, and the City thereby acquired a vested right by virtue of its contract which may not be damaged or destroyed at the will of the company.

The benefits moving to the City under the section quoted must be regarded as a part of the consideration for the grant to the company, and creates a relationship analogous to that of lessor and lessee. Certainly, had the City and the company entered into a formal written lease demising space to the City, in the terms of the ordinance, it could not be seriously contended that the City might be lawfully shunted about at the will of the company, and in addition compelled to bear the expense of the relocation. It is true the ordinance does not specify the location of such conduits, the right to use which has been granted the City, but the parties themselves have designated the location, the City by taking possession and the company by consenting. This designation, for all the purposes of the contract, is just as specific and effective as though formally expressed in the ordinance. It is a familiar principle of construction that courts will not disturb the interpretation of an agreement established by the parties to the agreement. Where a reasonable necessity exists, the company may have the right to relocate its equipment, and we would not say that in all cases such relocation could be enjoined, but we are clear that in all cases such procedure is subject to the rights of the City, and no matter how great the necessity so far as the company is concerned, the company is liable to respond in damages for such damages as the City can prove. Where no special damage accrues, we think the proper measure of damages would be the cost to the City in the adjustment of its facilities to the effected change.

Our answer to your inquiry is, therefore, that the company should bear the expense of relocating the City's equipment.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power and Authority of City To Condemn Street Through Cemetery.

April 1, 1924.

HON. JOSEPH OTTO KOSTNER, Chairman, Committee on Local
Industries, Streets and Alleys.

Dear Sir:

You have requested the Corporation Counsel for an opinion regarding the power of the City of Chicago to extend south California avenue through Mt. Hope Cemetery by condemnation, and also regarding the power of the City to condemn a portion of Mt. Greenwood Cemetery for a street.

Mt. Hope Cemetery was organized under "An Act concerning corporations," approved April 18, 1872, in force July 1, 1872 (Doc. No. 629765 County Recorder: Corporation index 16, page 82.)

Mt. Greenwood Cemetery was also organized under "An Act concerning corporations" (Doc. No. 230988, County Recorder; Corporation Index, volume 5, page 74).

The City of Chicago, as a general proposition of law, has been expressly delegated the power to open and extend streets. Section 7 of Article 5 of the Cities and Villages Act provides as follows:

"The city council in cities and the President and Board of Trustees in villages, shall have the following powers:

"7—To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate same."

The acquisition of private property for the purpose of establishing and extending a public street must be done by the power of eminent domain. The principle of law obtaining in all eminent domain cases for the condemnation of land

for public purposes, is that when the land to be condemned is already devoted to a public purpose and the new use to which it is proposed to put that land would destroy its use for the former purpose, it cannot be condemned. In the case of *City of Moline v. Greene*, 252 Ill. 475, the Supreme Court held that when property was already devoted to public use, it could not be condemned for a different public use, unless there was express statutory authority. In that case the City of Moline had attempted to condemn a portion of the property occupied by a public library for the purpose of widening the street. The court, at page 477, said:

“(1) Conceding that the Legislature has power to authorize public property devoted to one public use to be taken and appropriated to a different use for the public benefit, the question here for decision is: Has the Legislature, by any act adopted by it, authorized the taking of the library property by appellant? The library is a public library, and the land sought to be taken from it is devoted to a public use. *The general rule is that such property cannot be taken and appropriated to another and different use, unless the legislative intent to so take it has been manifested in express terms or by necessary implications. Chicago & Alton Railroad Co. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485; *Chicago & Northwestern Railway Co. v. City of Chicago*, 151 Ill. 348, 37 N. E. 842; 10 Am. & Eng. Enc. of Law, 1094; 15 Cyc. 616.

“(2) It is not contended by appellant that express authority is found in any legislative act to take the property here sought to be taken; but it is insisted such authority is necessarily implied from the said clause of Section 1 of Article 5 of the Cities and Villages Act (Hurd's Rev. St. 1909, C. 24, section 62) which confers power upon the municipal authorities ‘to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.’ In *Chicago & Northwestern Railway Co. v. City of Chicago*, *supra*, the right of the city to extend streets across the right of way of the railroad company was denied by the company. The court held that the clause of the Cities and Villages Act above quoted did not authorize the taking of property already devoted to a public use, but that the eighty-ninth

clause of Section 1 of Article V did authorize the city to extend its streets across the railroad right of way and tracks. That clause confers power upon the city to extend, by condemnation or otherwise, any street, alley, or highway over or across any railroad track, right of way, or land of any railroad company within the corporate limits. Section 17 of the chapter on Railroads (Hurd's Rev. St. 1909, C. 14, Sec. 18) confers power upon railroad corporations to take, by condemnation, property necessary to the building, operating or running of its roads; but in *Illinois Central Railroad Co. v. Chicago, Burlington & Northern Railroad Co.*, 122 Ill. 473, 13 N. E. 140, it was held that this general grant of power to railroad corporations to take real estate for railroad purposes was not intended to extend to property already applied to a public use. In that case the Chicago, Burlington & Northern Railroad Company sought to condemn for railroad purposes land belonging to the Illinois Central Railroad Company running longitudinally with and constituting a part of that company's right of way. The court held this was unauthorized, and said 'That the Legislature of the state might, subject to the conditions imposed by the constitution, take the property for the purposes in question we have no doubt. And we think it equally clear that the Legislature might, by a general law manifesting such intention, authorize one railroad company to condemn a part of the right of way of another to the extent and for the uses proposed in this case; but without such legislative authority or enabling act it is manifest the taking of it would be unauthorized.' "

Other similar cases to the same effect are: *Central City Horse R. Co. v. Ft. Clark Horse R. Co.*, 81 Ill. 523; *Chicago R. Co. v. Lake*, 71 Ill. 333; *Lake Shore R. Co. v. Chicago R. Co.* 97 Ill. 506; *St. Louis R. Co. v. Postel Co.*, 173 Ill. 508; *Gillette v. Aurora R. Co.*, 228 Ill. 261; *City of Edwardsville v. County of Madison*, 251 Ill. 265.

In applying the foregoing proposition of law that property already devoted to a public use cannot be condemned or a different public use, two questions arise,—first, whether the property used as a cemetery is property devoted to a public use, and second, whether the extension of the street

through a cemetery would impair the use of the property as a cemetery. With regard to the first query, there can be little question but that a cemetery which offers to bury any person, providing only that the usual fees are paid and usual regulations complied with, is a public cemetery and that the use of that property is a public use. In the case of *Re Application of the Board of Street Opening and Improvement*, 16 L. R. A. 180, the New York Court of Appeals considered the question of whether a street could be extended through Trinity Church Cemetery. In that case it was held that because the general public did not have a right of burial therein that the cemetery was not a public cemetery but rather a private cemetery. The court, at page 181, said:

“But this was not a public cemetery, and so far as it appears in this record had never been devoted to a public use. The public generally never had any right of burial therein. No burials therein could be made except by permits given by Trinity Church, and all the interments therein had been made by this authority. The cemetery land was not therefore devoted to public but to private use. *Re Deansville Cemetery Association*, 66 N. Y. 569, 23 Am. Rep. 66.”

Conversely stated, the rule would seem to be, that when there are no restrictions with regard to the right of burial in the cemetery and when any of the public may be buried therein, the cemetery is a public cemetery and the land is devoted to a public use. So far as this office has been able to ascertain, both Mt. Hope and Mt. Greenwood cemeteries are public cemeteries.

In answering the second query, if bodies are already interred in that section of the property desired to be condemned for a street, it is obvious that the use of that section of the cemetery, at least, would be totally destroyed and therefore no right of condemnation would exist under the principle laid down in *City of Moline v. Greene, supra*.

A different question arises, however, when a portion of the land sought to be condemned is not yet in general use for a burial ground. It then becomes a question of fact to de-

termine whether the extension of the street through the property not already in use for burial purposes will interfere with the surrounding property which is in use for burial purposes to such an extent as to impair the use of that property. (*C. & N. Elec. Ry. Co. v. N. W. Ry. Co.*, 211 Ill. 352, at 363.)

In the case of *Cemetery Association v. Railroad Co.*, 121 Ill. 191, the cemetery company owned a very large section of land. Only a small corner of that land was enclosed by a fence and actually in use as a cemetery. The rest of the land, consisting of a considerable number of acres was not enclosed in any way and was not, at that time, used for burial purposes. The Court held that the railroad could condemn a right of way across that section of the land which was not in use at that time as a cemetery. However, it should be observed that if the land desired to be condemned is located in the center of the cemetery, then, even though that strip of land itself may not be used for burial purposes, it might be that putting a public street through the center of the cemetery would interfere with the adjoining land for the burial purposes to which it is already devoted, in that there would occur the various noises caused by traffic and large throngs of people passing on the street which might very well be inconsistent with the quiet and dignity necessary to the maintenance of the cemetery.

That the Supreme Court of Illinois is very reluctant to interfere in any way with the use of cemeteries by extending streets through them may be seen from the language employed by the Court in the case of *Trustees v. Walsh*, 57 Ill. 363. In that case the exact question of the right of the city to condemn land for a street through a cemetery was not considered, but the language of the Court is very significant. At page 365, the Court said:

“Appellants, soon after their purchase of the block, united both pieces into one by inclosing them with a suitable fence, and dedicated the whole ground to public use as a graveyard. Grounds thus devoted were regarded by the civil law as ‘sacred, religious and holy,’ and belong to no individual. Cooper’s Justinian, 69. And the

civil law in this particular, is said by Bracton to be the common law, and it would be strange indeed that a system, based upon so accurate a theory of human nature as the common law is, should fail to recognize a sentiment so deeply seated in the human heart, and so universal in the human race, whether civilized or savage.
* * *

“It is upon the principle that burying places, laid out and consecrated to such use, become public immunities, or common privileges, and if the right asserted would, when carried into effect, disturb the enjoyment of those immunities or privileges, and the right itself be ill-founded, then, as such disturbances would be no more than a private trespass—would be a public nuisance going to the irreparable injury of the congregations complaining—chancery has jurisdiction to restrain its commission, and to quiet the appellants in the possession and use of their cemetery.

“What, we may ask, would be the measure of damages at law, for the wounded sensibilities of the living, in having the graves of kindred and loved ones blotted out and desecrated by common highway travel? The inadequacy of a remedy at law, is too apparent to admit of argument.”

In the case of *Ritter v. Couch*, 42 L. R. A. (N. S.) 1216, the West Virginia Supreme Court of Appeals, in holding that a street could not be extended through a cemetery, at page 1219, said:

“It is very certain that the city acquired the lot for burial purposes; that it took possession of the lot and inclosed it and controlled it as a burial ground; that it permitted, through many years, the burial of the dead in it; and thus it is clear that it received this lot and dedicated it to public use for the burial of the dead. Nothing is wanting on the part of the city to show that it consecrated and dedicated the lot for the burial of the dead. The kindred dead of the plaintiffs lie in that old pioneer graveyard under this dedication and consecration. The municipality of Charleston acquired this property for public use, and devoted it to this use, a legitimate public use, as the burial of the dead is indispensable. Land so acquired by a municipality for such purpose, and dedicated, is a dedication to a pious and charitable use. *Hopkins v. Grimshaw*, 165 U. S. 342, 41

L. ed. 739, 17 Sup. Ct. Rep. 401; *Evergreen Cemetery Asso. v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643. In the last named case the Court said: 'All must be regarded alike as consecrated to a public and sacred use. The idea of running a public street regardless of graves, monuments, and the feelings of the living, through one of our public cemeteries would be shocking to the moral sense of the community, and would not be tolerated, except upon the direct necessity.' "

See also 5 R. C. L. 241, Section 6.

Section 79 of Article V of the Cities and Villages Act is as follows:

"The city council in cities, and the president and board of trustees in villages, shall have the following powers:

"Seventy-ninth—To establish and regulate cemeteries within or without the corporation, and to acquire lands therefor, by purchase or otherwise, and to cause cemeteries to be removed, and prohibit their establishment within one mile of the corporation."

The foregoing delegation of power to regulate and remove cemeteries has been construed to be a delegation of police power, only. In the case of *Ritchey v. City of Canton*, 46 Ill. App. 185, the Court, at page 186, said:

"It is a fact conceded by the stipulation of the parties that Mrs. Almeda Rush was the owner in fee simple of the lot in question before the appellee became possessed of any interest whatever in the cemetery grounds. The lot is, however, within the limits of the city, and her use of it, though she held by title in fee simple, is subject to the exercise on the part of the city of that inherent and plenary power resting in the State, and by the State delegated to the city, to prohibit all things hurtful to the comfort, safety, and welfare of the inhabitants of the city. Subject to the exercise of power, we are, under the stipulation, to recognize as existing in her all the rights that flow to and vest in the owner of real property devoted to the purpose of the burial of the dead, in no wise diminished by the acquisition by the city of the title in trust to the other portion of the cemetery grounds. The power of the city to regulate by ordinance the use and the manner of use of the burial

lots by persons purchasing from the city after the adoption of such ordinance does not apply to her lot, except to the extent that the provisions of the ordinance are directed to the protection of the health, comfort, safety and welfare of the public. The lot is her property, with all the title and rights of fee simple ownership of cemetery lots located within the limits of a city. One of these rights is the privilege of interring therein the bodies of her dead by her own hand, if she likes, or by the hand of such sympathetic neighbors or friends as may volunteer their services, or by whom she may employ for that purpose. The city may by ordinance establish such regulations concerning the manner of digging the grave, its depth, etc., and the interment, as are reasonable in their character and necessary for the protection of the public health and welfare, and she or those who make the grave for her must conform to such regulations."

As to the power delegated to the city to "remove a cemetery" that power, in our opinion, may only be exercised when the cemetery is in fact a nuisance, or possibly when the existence of the cemetery has become an actual burden upon the development of the city. Thus, it might be, that if a cemetery were located in the loop district of Chicago that it could be removed. Such a question, however, does not arise for purposes of this opinion, and, accordingly, we do not pass upon it.

In the case of *Town of Lakeview v. Letz*, 44 Ill. 81, the Supreme Court held that when a cemetery was not a nuisance in fact, it could not be declared a nuisance and the establishment of it prevented as such.

It might be noted for the purpose of making this opinion complete on the subject that prior to 1870 certain cemeteries had been incorporated under special charters and it was customary in those charters to provide that no streets could be extended by the city through the cemetery. Under such a charter, our Supreme Court has held that the city may not extend streets. *Village of Hyde Park v. Oakwoods Cemetery Association*, 119 Ill. 141. Such, however, is not the case here, for both Mt. Greenwood and Mt. Hope cemetery were incorporated under the general incorporation law.

For the foregoing reasons it is our conclusion, that the right of the City of Chicago to extend a street through the aforesaid cemeteries, necessarily depends upon the facts. If the portion to be condemned is not in present use as a cemetery and if the uses of the remaining portion will not be materially and substantially impaired by the extension, then the city may so extend the street; otherwise not.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Vacation of Streets—Title to Vacated Property—Vote
of Council—Damages to Abutting Landowners.**

April 3, 1924.

HON. DONALD S. MCKINLAY, Alderman 19th Ward.

Dear Sir:

We have your letter of February 5th, concerning the ordinance now pending before the Streets and Alleys Committee for the vacation of parts of California and Fairfield avenues between 107th and 110th streets for the use of Mt. Greenwood Cemetery. We note that one of the objectors is of the opinion that the ordinance is illegal because of the possible future public need of the street.

Par. 7, Section 1, Article V of the Cities and Villages Act gives the City, *inter alia*, the power to vacate streets, and by Section 2 of the Vacation Act it is provided that when a street or alley is vacated the lot lines of the abutting owners on either side shall extend to the center of what was formerly the street or alley. Your idea that the question of

validity of a vacation ordinance turns on the nature of the purpose for which the street is vacated is in accord with our own views. The City cannot convey any part of a street to a private individual and whenever this is sought to be done under the guise of vacation, the vacation is undoubtedly invalid. A vacation in legal contemplation is an abandonment or relinquishment for public purposes of the space vacated, and the Vacation Act vests the title in the vacated space in the abutting owners. For a great many years our Supreme Court held this section of the Act unconstitutional and further held that the title to the vacated street became vested in the owner of the fee of the abutting land at the time the street was originally dedicated. But in the case of *Prall v. Burckhardt*, 299 Ill. 19, that court completely repudiated its former holdings and followed the statute. In the *Corn Products Co.* case, 286 Ill. 226, to which you refer, the question of vacation was not directly in issue, but was introduced into the case in an endeavor to bolster up a plainly invalid ordinance attempting to give the Corn Products Company authority to span a City street with an overhead bridge to connect two of the company's buildings. A consideration of the vacation ordinance was not necessary to a determination of the issues presented, and what was there said concerning it must therefore be regarded as more or less *obiter*. Nevertheless, the language there employed stated the views of the court and is undeniably good law. The court there said that while courts will not inquire into the motives prompting legislation, in cases of vacation where legislative discretion might be easily abused the courts will inquire into the facts and circumstances surrounding the matter to determine whether a street or alley is vacated because there is no longer public need for it, or because it is desired to subserve a private interest.

The proper way to test the validity of such an ordinance is by ejectment against the owners of the land abutting on the vacated street.

We call your attention to Section 1 of the Vacation Act which provides that a street shall not be vacated except by

a *three-fourths majority* vote of *all* of the aldermen of the City. In other words it requires 38 aye votes to vacate a street in Chicago. That section also provides that when a street is vacated and property is thereby damaged, the City may be compelled to respond, and that the City in turn may require of the person for whose benefit the street is vacated to pay such sum of money as will properly indemnify the City for any sums it may be required to pay to damaged property owners. This latter provision is somewhat inconsistent with the theory of vacation, it being presumed that a street is vacated because there is no longer public need for it, and not for the purpose of abutters' profit or convenience. However, we are not aware that any court has ever expressly pointed out this inconsistency, nor do we believe it invalidates this provision of the section.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

When Widow of Police Officer Is Entitled to "Compensation Annuity"—When Officer Is Killed in Performance of Act of Duty.

April 4, 1924.

TO THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY
AND BENEFIT FUND.

Gentlemen:

The question presented through the application of Ellen Hurst for a pension is, whether the death of Policeman Edward Hurst, her husband, resulted from injury incurred in the performance of any act or acts of duty, and I submit the following:

I have read the report of Trustee P. J. DeVoy, covering his investigation of the death of Policeman Edward Hurst of the 16th District, and have also looked over the minutes of the hearing before the Coroner.

From these it appears that immediately prior to the time of his death, Edward Hurst was on active duty patrolling his post; that on December 24, 1923, shortly before the injury which caused his death, the deceased was passing 1925 Allport street and noticed that the door of a saloon located at that number was open; that the premises in question were occupied by one Winko Maric, who lived in an attic above the saloon with his wife, two daughters and some boarders; that about two or three months previous to this time Hurst had arrested Maric for selling intoxicating liquors; that Maric had no license to operate a "soft drink" parlor or other business at that place; that the deceased entered said premises and while within said premises Hurst was fatally shot.

The testimony of Maric at the Coroner's inquest was that Hurst had demanded a "Christmas present" from Maric; that an argument and struggle followed and that when Hurst drew his revolver with his right hand the revolver was discharged in the struggle injuring Hurst so that he died.

Maric's story as to the "Christmas present" is corroborated by a man named Pokorny, a friend of Maric's and one of his boarders, but is weakened by one of the daughters of Maric, who said that Hurst just said "Merry Christmas" and that she did not hear him make a demand for a "Christmas present" or money. In view of the fact that Maric was liable to be charged with the murder of Hurst, both his story and that of the boarder are to be looked upon with suspicion.

Twelve other owners of "soft drink" parlors on Hurst's post all make affidavit that they saw Hurst almost daily and that he was always an honest, sober and conscientious officer. In addition to the affidavits above referred to, Trustee DeVoy reports a number of other persons who speak of Hurst

as being sober on the day in question and not having made demands for money in other places that he visited, particularly one James Hynik, who said he was with Hurst approximately fifteen or twenty minutes before Hurst was shot. The evidence further shows that when the patrol wagon arrived at the saloon after the shooting, Maric was at the saloon door and gave the policeman Hurst's belt, star and revolver; that Maric claimed that the star fell off during the struggle, a thing that is said to have been impossible, as the loops which held the star in position were not torn, nor was there anything to show that the pin of the star was bent or broken. Maric's statement that Hurst had removed his belt and threw it away is also improbable.

Another thing that casts great doubt upon Maric's story of Hurst's visit and what followed, is the physical fact that if Hurst drew his revolver with his right hand, as Maric claimed, no matter how severe or complicated a struggle followed, Hurst could hardly, with the gun in his right hand, have shot himself to the left of the navel and the bullet have followed a left to right course, as reported by the examining physician.

No credence is to be given Maric's story of what happened after Hurst entered the saloon, as nothing can be expected of Maric excepting that which would tend to clear him; neither is the story of Maric's friend and boarder, Pokorny to be given credence. The statement of Maric's daughter, being against the interests of her father, is more entitled to credence, and when to this has been added the conduct of Hurst in the other "soft drink" parlors visited by him that day, in all of which he wished the people a "Merry Christmas", was sober and made no request for a "Christmas present," the preponderance of evidence bears out the statement of Trustee DeVoy in his report when he says:

"It must be presumed that the police officer in the strict performance of his duty touring his post saw the saloon door open and knowing that the proprietor had no license to operate entered to investigate."

What brought Officer Hurst up into the attic is a mere conjecture; his lips are sealed and Marie is not to be believed. In the course of his investigation, Hurst may have gone upstairs, or Marie may have invited him up under the pretext of showing Hurst that no liquor was in the house. The presumption must favor the legality and propriety of Hurst's conduct, in the absence of credible evidence to the contrary.

The story told by Marie as to Hurst's conduct is so contradictory of other reports of Hurst's bearing, attitude and conduct generally on that day, up to within twenty minutes of his visit to Marie's place, that it cannot be believed that Hurst conducted himself in the manner described by Marie, unless it be assumed that the character of Hurst had undergone a complete change within a few minutes; we cannot indulge in this assumption.

On the question as to whether or not Officer Hurst was in the performance of his duty at the time he was killed, the preponderance or greater weight of the evidence tends to show that Officer Hurst met his death while in the performance of an act of duty; if any doubt existed as to the occurrences immediately preceding the shooting, the presumption of law is that Officer Hurst, having entered the premises as an act of duty, was in the performance of his duty up to and including the time of his fatal injury, and, in the absence of credible evidence to the contrary, that presumption must prevail. There is no such credible evidence to the contrary.

I am of the opinion that the death of Edward Hurst resulted from injury received in the performance of an act of duty, and that Ellen Hurst, the widow of Edward Hurst, is entitled to compensation annuity in accordance with the provisions of Section 33 of the Policemen's Annuity and Benefit Fund Act.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Vicious Dogs—When Police May Impound.

April 7, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In reply to your communication of April 1, concerning a complaint made by the Poundmaster that the Anti-Cruelty Society have been harboring vicious and biting dogs and refusing to surrender them to the Police Department, we call your attention to the following provisions of the City Code;

Section 1048 provides that every person who owns or keeps a dog within the city limits shall report annually within thirty days after the first of May to the City Clerk and procure a license.

Section 1051 requires that dogs be securely muzzled when permitted in public places unless led by a chain or leash.

Section 1052 fixes the penalty for violation of either of these two sections, and Section 1053 makes it the duty of the Police Department to take up and impound any dogs found running at large contrary to these provisions.

Section 1058 provides that if any dangerous, fierce or vicious dog shall be found at large in any public place, or upon the private premises of any person other than the owner, and shall there annoy or endanger any person, the owner or keeper of the dog shall be fined not less than two dollars nor more than two hundred dollars. In other words, the owner of a properly licensed dog, no matter how savage or vicious the dog may be, may maintain and keep the dog on his own premises without violating this section, but not take it or permit it to stray elsewhere.

By Section 1059 it is provided that if any dangerous or vicious dog runs at large in the streets or public places of the City, and any dog which may in any manner disturb

the quiet of any person or neighborhood, or which shall bite a person or so injure a person as to cause an abrasion of the skin, such dog is declared to be a nuisance and shall be taken up and impounded. That section also provides that if a vicious or dangerous dog may not be safely taken up, he shall be slain by any policeman. It is there also made the duty of any person receiving a dog from the pound to muzzle the dog for at least fifteen days after receiving it.

You are advised therefore, that anyone who keeps a dog known to be vicious or a biting dog, does so in plain violation of this ordinance, and upon their failure to surrender the dog, you should proceed as in other cases of violation of penal ordinances.

Yours very truly,

J. J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

What Constitutes Obscene, Profane or Blasphemous Literature.

April 10, 1924.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter of the 4th inst., enclosing a letter addressed to the Mayor, the Corporation Counsel, yourself and the U. S. District Attorney calling attention to an attached periodical known as the Chicago Literary Times, is received.

We have carefully read through this publication and agree with the president of the Chicago Law and Order League, who submitted it, that the paper is of a highly un-

desirable nature and certainly is not a valuable addition to contemporary literature. Nevertheless we are of the opinion that it is within the letter of the law although dangerously near the line that separates the lawful from the unlawful. We find it replete with profanity and blasphemy and numerous highly colored and improper references, but we doubt if we could make out a case against the publishers under the present laws. We find no statute or ordinance covering the publication of profanity or blasphemy, desirable as such a law would be.

Par. 353, Ch. 38, Cahill's R. S. makes it unlawful to possess, sell or give away any paper devoted to the publication or principality made up of criminal news, police reports or accounts of criminal deeds, or pictures and stories of acts of bloodshed, lust or crime. We do not think the Literary Times comes within the prohibitions of this section.

Par. 455 of the Criminal Code, Cahill's R. S., makes it unlawful to possess, sell or give away any indecent or obscene publication, etc. The issue of the Literary Times which has been submitted to us much belies its name and certainly makes no appeal to literary tastes, but it is calculated only to satisfy the morbidity of those whose tastes may thus be satisfied. Yet, while this is true, the publication appears to be edited with an eye to the law and it is our judgment that in its present condition it is as close to the line as it can get and still be within the law.

Section 2668 of The Chicago Municipal Code of 1922 makes it unlawful to sell or distribute any indecent or lewd book or any other thing of a scandalous or immoral nature. If this paper may be said to be in violation of any law, we think this section must be considered the one violated rather than the State Act. And as above pointed out, the language used in the various enactments is so broad and general, we think it requires a clear case to establish guilt, having in mind the constitutional inhibition against interference with the freedom of the press. It is, of course, the law that the so-called freedom of the press is not to be construed as an unlimited

license to publishers to publish anything and everything they see fit to print, but must be construed in the light of the police power of the States to regulate public morals and the general welfare of the people.

From a consideration of all that is before us in this case, we are of the opinion that the probable outcome of any prosecution that might be instituted against the publishers of this paper is too doubtful to justify such a proceeding at this time. But we do suggest that this paper be carefully watched and unless the publishers show some disposition to tone it down somewhat, that you direct your staff to order its removal from the stands, and that the publishers be so notified.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Payment by City of Voucher in Favor of a Corporation Which Has Ceased to Do Business.

April 2, 1924.

HON. L. E. GOSSELIN, Deputy Comptroller.

Dear Sir:

We have your inquiry of January 29th last concerning disposition of voucher you are holding payable to Melton-Larkin Paving Co., a corporation, in the sum of \$137.50. We also note that the company ceased doing business five or six years ago, and that A. F. Melten, the then president of the

company, is now demanding payment of the voucher and that you have declined payment pending an opinion from this office as to the disposition you should make of the voucher.

When a corporation ceases doing business and is liquidated, in the absence of any assignment or agreement concerning unpaid obligations due the company at the time of the liquidation, or subsequently to become due, such claims become the property of the stockholders in proportion to the amount of stock owned by each such shareholder. Where the company ceases doing business, but is not liquidated, and retains its corporate identity, the right or claim is still the property of the company. The city may properly pay the amount due to one known to have been an officer of the company and is not responsible for the application of the funds when paid.

If the company's charter has not been surrendered or forfeited, the company may in its own name properly claim the amount. Inasmuch as this company has ceased doing business, it is probable that it has not complied with the statute in the matter of filing annual reports with the Secretary of State. This defect in its corporate status, however, does not of itself forfeit the charter and can only be raised in a direct proceeding and not in a collateral action brought for the recovery of money, and does not affect the right of the company to maintain actions for sums due.

As to the judgment against this company secured by R. Hanisch Sons Co., unless this judgment creditor has garnisheed the City for the amount of its judgment, your office need take no notice of its claim.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:-

FRANCIS X. BUSCH,
Corporation Counsel.

**Power and Authority of City To Maintain and Operate
a Municipal Foundry to Manufacture Castings To
Be Purchased by the Board of Local Improve-
ments for Street Use.**

April 11, 1924.

HON. WILLIAM E. DEVER, Mayor, City of Chicago.

Dear Sir:

There has been submitted to the Corporation Counsel for consideration the question of whether the Board of Local Improvements may purchase or otherwise obtain their castings from a municipal foundry. It appears from a communication of Honorable A. A. Sprague, Commissioner of Public Works, that the total tonnage of castings required by the City of Chicago for the year 1923, amounted to 3,400 tons. Of this total 1,780 tons were used by the Board of Local Improvements. Mr. Sprague, in his letter, states that if the casting required by the Board of Local Improvements can be manufactured by the City of Chicago at its municipal foundry, then, in his opinion, the reopening of the municipal foundry will be advantageous to the City.

Section 74 of "An Act concerning local improvements" approved June 14, 1897, in force July 1, 1897, provides as follows:

"Section 74. All contracts for the making of any public improvement, to be paid wholly or in part by special assessments or special tax, and any work or other public improvements, when the expense thereof shall exceed five hundred dollars (\$500), shall be let to the lowest responsible bidder in the manner herein prescribed, such contracts to be approved by the president of the board of local improvements. In case of any work in which it is estimated that the work will not cost more than five hundred dollars (\$500), if after receiving bids it shall appear to said board of local improvements that said work can be performed better and

cheaper by the city, town or village, or the authorities thereof, the authorities of the city, town or village shall perform said work and employ the necessary help therefor, and the cost of said work by said city, town or village, or the authorities thereof, shall in no case be more than the lowest bid received."

It will be noted that the foregoing section of the statute provides that all contracts for any work or public improvement, when the expense exceeds \$500.00, shall be let to the lowest responsible bidder. And it is further provided that when the cost of the work in any improvement is less than \$500.00, the work may be done by the City only after bids have been actually received, and then, if, in the judgment of the Board of Local Improvements, it appears that the work can be performed better and cheaper by the City than by the contractor.

The purpose of requiring municipal contracts to be let to the lowest responsible bidder is to prevent fraud and favoritism in the letting out of municipal contracts.

McQuillin on Municipal Corporations, in Section 1184, says:

"Generally there are charter or statutory provisions requiring proposals for bids for certain municipal contracts to be advertised and the contract let to the lowest and best, or lowest responsible, bidder. Such requirements are for the purpose of inviting competition and preventing favoritism and fraud, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit of or to enrich bidders, and are to be executed with sole reference to the public interest. These provisions are strictly construed by the courts, and will not be extended beyond their reasonable purport."

The Supreme Court of Illinois has frequently held that whenever a statute describes a mode in which a municipal corporation may act for the purpose of entering into a contract, that the provisions of the statute are mandatory and that the method prescribed must be strictly complied with.

This exact question has arisen with regard to the aforequoted section of the Local Improvements Act, and the Supreme Court has held that the requirements therein laid down, that contracts to be submitted by bidders are mandatory. In the case of *Siegel v. City of Chicago*, 223 Ill. 428, the court, at page 431, said:

"It is evident that section 74, *supra*, contemplates competition in the letting of contracts for the construction of public improvements by special assessment, otherwise the provisions requiring such contract to be awarded to the lowest responsible bidder would be nugatory. * * *

"It is a general rule that where a statute requires competition in the letting of contracts for the construction of public improvements or the doing of public work, any provision contained in any ordinance therefore which tends to prevent or restrict competition among persons who may desire to become bidders is in contravention of such statute and therefore illegal."

See also:

People v. Lamon, 332 Ill. 587.

Alex. Lumber Co. v. Farmer City, 272 Ill. 264, at 273.

City of Hoopeston v. Smith, 272 Ill. 604.

City of Rockford v. Armour, 290 Ill. 425, at 427.

City of Lincoln v. Thompson, 190 Ill. App. 536.

In the case of *City of Centralia v. Norton & Co.*, 140 Ill. App. 46, at page 51, Norton & Co. had been awarded the contract to construct the sewer system for the City. After commencing upon the work, the said company went bankrupt. The City thereupon undertook the work and completed it by day labor without calling for bids. The court, in the course of its opinion, held, that under Section 74 of the Local Improvements Act, the City could only act as prescribed by the statute and that it could not undertake to do the work itself. The court, at page 71, said:

"Section 74 of the statute in relation to local improvements, under which the work in question was being done (Revised Stat. Hurd. 1905, chap. 24, par. 580) provides that: 'All contracts for the making of any pub-

lie improvement to be paid wholly or in part by special assessment or special tax and any work or other public improvements, when the expense thereof shall exceed five hundred dollars (\$500), shall be let to the lowest responsible bidder in the manner herein prescribed, such contracts to be approved by the president of the Board of Local Improvements.'

"In this case the work done by the city in completing the contract was both to be paid for by special assessment and exceeded in amount \$500, so that the law required the contract should be let to the lowest responsible bidder. This however was not done by the city, but it proceeded to do the work itself, employing labor by the day.

"It is claimed by appellant that an emergency existed and had the outlet sewer not been immediately completed the whole sewer system would have been ruined. We are not satisfied that proof was made of the existence of such condition of affairs, but even if it had, we do not think it would have warranted the officials in doing the work as they did by day labor. The section in question is mandatory in requiring the advertisement for bids and the fact that the work done by the city was made necessary by the abandonment of the contract by the contractor makes no difference in the rule."

In the case of *City of Chicago v. Hanreddy*, 102 Ill. App. 1 (affirmed 211 Ill. 24) the City of Chicago had let a contract for the construction of a sewer system. The contractor subsequently abandoned the work and new bids were requested and received. The bids not being entirely satisfactory the City Council thereupon authorized the Commissioner of Public Works to complete the work by day labor to be employed by the City of Chicago. The court held that such procedure was not authorized by Section 74 of the Local Improvements Act.

In view of the foregoing decisions, we are constrained to hold that the procedure outlined by Section 74, *supra*, is mandatory and that the City has no power to depart from it or to modify it. If the Board of Local Improvements should purchase its castings from a municipal foundry or if it should require contractors so to do, it would be pursuing

a line of procedure which is not authorized or contemplated by statute.

Our understanding is that in the past at various times the City of Chicago has maintained a municipal foundry on a small scale. At certain times, the City, while maintaining its machine shops, used those shops for the purpose of manufacturing castings, and it was then the custom for the contractors to purchase their castings from the City foundry. For the City to thus manufacture the castings for sale, to provide contractors is, in our opinion a carrying on of private business by the municipality. This would certainly be true if it were carried on extensively, or if the City derived a profit therefrom.

It is elementary that a municipal corporation may not carry on a private business. In this regard, we quote from McQuillin, Section 359:

“Section 359. The object of the creation of a municipal corporation is, that it may perform certain public functions as a local organ, and, also, as a subordinate branch of the state government; and while it is invested with full power to do everything necessarily incident to a proper discharge thereof, no right to do more can ever be implied. In the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals. Under authority to construct and maintain a waterworks system, it cannot engage generally in the plumbing business. So, a municipal corporation cannot encourage the development of coal, natural gas and other resources of the locality by subscribing to the stock of companies organized for such purpose.”

Section 368:

* * * “The power to engage in the business of brick making is not included in the powers expressly granted to the City of Detroit. It is neither fairly implied in, nor incident to, such powers as are expressly granted, nor is it indispensable or even essential to the declared objects and purposes of the corporation. While

the law permits municipal corporations to do those things which are necessary to accomplish the objects of their creation, under an implication of power, the right has not usually been held to go so far as to permit them to engage in the manufacture of articles necessary to their lawful enterprises, where they are in common use and are to be had in the open market."

It is true that under Section 74 of the Local Improvements Act, when there is a public improvement and when it is estimated that the work will not cost more than \$500.00 that it may be performed by the City, nevertheless, it is expressly provided that this procedure may only be followed if, after bids have been received it appears to the Board of Local Improvements that the work can be performed better and cheaper by the City than by the contractor.

In conclusion, therefore, it is our opinion that when the cost of the improvements exceeds \$500.00, the work must be done by private contractors after bids have been submitted; and that the City, if it attempted to manufacture castings and sell them to private contractors, would be performing an *ultra vires* act in that it would be engaging in private business. If the cost of a public improvement be less than \$500.00, then the City may enter upon performing the work if, after receiving bids, it can do so cheaper and better.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Liability of City To Reimburse Civil Service Employee
for Costs Paid by Him in Defending Charges Be-
fore Civil Service Commission—Payment of
Moral Claim by City.**

April 11, 1924.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Your communication dated April 4th, concerning the liability of the city to pay to George C. Jensen his costs and expenses incurred in connection with his trial by the Civil Service Commission is received.

We have read through the statement submitted by Jensen very carefully, and nothing appearing to the contrary, we take what is there alleged to be true. It appears that on September 7, 1921, Jensen was found by the Civil Service Commission to be guilty of certain charges theretofore preferred against him, and was ordered discharged from the service of the city; that on October 16, 1922, in a certiorari proceeding brought to review the finding of the Commission, the Circuit Court of Cook County quashed the record of the Commission, and that an appeal from the Court's judgment was subsequently dismissed for want of prosecution in the Appellate Court. It is not stated whether the judgment of the Circuit Court was founded on the merits of the controversy or the form or regularity of the proceedings. This might be important were it not for the fact that by a subsequent agreement Jensen agreed to accept one-half of the back salary due him on the express condition that he be forthwith reinstated as patrolman in the Police Department, and it appears that the terms and provisions of that agreement were duly and regularly carried out.

It is then alleged that notwithstanding this disposition of the controverted matter, the Superintendent of Police

again filed charges against Jensen based on matters and things identical with and arising out of the same situation that provoked the previous litigation; that upon hearing of the charges, the Commission found "No Case" and dismissed the charges; that in and about the presentation of his defense at this last hearing Jensen incurred expenses of \$437.55, for which amount he has exhibited his claim to your Committee.

The City is under no legal liability to pay this claim. The Superintendent of Police may file charges against any member of the Police Department as often as he may see fit without creating a liability on the City to be mulcted for costs or damages in the event the charges are found to be groundless. Taking the record before us to be true, and there is nothing to the contrary appearing, the equities of the situation appear to be clearly with the petitioner and it would seem in equity and good conscience that he should be reimbursed by somebody for the expenses and costs he has been compelled to sustain. You are, of course, aware that there is a constitutional prohibition against the expenditure of the corporate funds of the City for other than public purposes. It has, however, been held that in cases where the City is morally and equitably obligated, it may expend corporate funds, though the purpose be not strictly public, and even though no recovery could be had at law. *People ex rel. v. Prendergast*, 202 N. Y. 188; *Morris & E. R. Co. v. Newmark*, 76 N. J. L. 555; *Justice v. Philadelphia*, 37 Pa. Super. Ct. 267; *Bailey v. Philadelphia*, 167 Pa. St. 569. It is for the council in its discretion to determine whether this is such a case.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Status of South Third of Square Bounded by 23d
Street, 24th Street, Wabash Avenue and Michigan
Avenue—Right of Board of Education to
Close Alley.**

April 12, 1924.

MR. JOHN E. BYRNES, Business Manager, Board of Education.

Dear Sir :

In your letter of April 9th you ask whether the Board of Education would be within its rights if it closed the alley running through the middle of block 34 in Canal Trustees subdivision of the west half of section 27-39-14. Block 34 is substantially the south third of the square bounded by 23d street, 24th street, Wabash avenue and Michigan avenue.

The City acquired title to block 34 in 1853, and still holds title. Mention is made of this as your letter states that the Board of Education owns the east half of the block. If title be in the Board it is not of record.

May 19, 1873, the City Council by ordinance directed that an alley be opened through the middle of block 34 from 24th street north to the south line of block 31, to connect with and be of the same width as the alley extending north from that point to 23d street. The ordinance was approved by the Mayor May 22, 1874.

June 3, 1874, a petition was filed in the Superior Court, number 49369, to condemn the strip above mentioned as an alley, making E. Mendel defendant. He held a lease from the City on the west half of the block. Beyond filing petition and issuing summons no step was ever taken. Condemnation of Mendel's leasehold interest in the strip to be taken was probably found unnecessary. The lease has long since expired. The alley was last paved in 1908. Other paving may have been laid down before that time.

Owners of property abutting on the alley north of lot 34, and the public generally, have a substantial interest in keeping the alley open across block 34. By court action they could successfully resist an attempt to close it.

We believe the Board of Education has no legal right to fence in the strip across block 34.

Yours truly,

DANIEL V. GALLERY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Garages of Public Carriers Are Included by the Ordinance Regulating Public Garages.

Chicago, April 14, 1924.

WILLIAM J. CONNORS, Esq., Superintendent, License Department.

Dear Sir:

In your letter of recent date you state that the question has arisen as to whether garages maintained by public carriers, like taxicab companies, cartage companies, express companies, etc., come within the definition of "public garage" as given in The Chicago Municipal Code of 1922.

In presenting this question to us you quote two paragraphs from Section 243 of the Code, and you state that you are interpreting these paragraphs so as to include such places as you mention. In other words, you apparently base your view on the theory that these places come within the kind of premises described in Paragraphs 1 and 2 of Section 243.

While you may be right as to this, we believe there is a far more certain way of arriving at the same conclusion. We do not look upon these paragraphs as defining "public garage," which is in fact defined in Section 242. The two paragraphs describe premises which are included in the definition but which the ordinance says the definition "shall not be limited to." Specifically, these are places where rent is charged for housing, where a livery business is conducted, and presumably also the kind of places you speak of.

Sections 242 and 243 read as follows:

"242. *Public garage defined.*) The words 'public garage' as used in this article shall be held to mean and are hereby defined as meaning any building, structure, premises, enclosure or other place (except a public thoroughfare) within the city, where two or more automobiles, autocars or any similar self propelled vehicles are stored or parked in a condition ready for use; provided, however, that this shall not be deemed to include or to mean any building, structure, premises, enclosure or other place which is hereinafter defined as a private garage.

"243. *What is included in public garage.*) Public garages, as defined in the foregoing section, shall include (but shall not be limited to) the following:

"1. Premises where two or more automobiles are stored or housed for hire, or where rent or compensation is paid to the owner, manager or lessee of the premises for the housing, storing, sheltering, keeping or maintaining of such automobile.

"2. Premises where two or more automobiles are kept for the purpose of letting for hire or reward, with or without a driver, to be used for the transportation of passengers, goods, merchandise, materials, salvage, waste or rubbish."

From the above it is quite plain that under Section 242 every garage where two or more automobiles are housed comes within the definition of a "public garage" unless it is defined as a "private garage." The further inclusion of those specifically mentioned in Section 243 does not limit, or detract from, this meaning. The only question is whether

such a place is included within "private garages," as defined in Section 260.

Section 260 reads as follows:

"260. *Private garage defined.*) The words 'private garage' as used in this article shall be held to mean, and are hereby defined as meaning any building, structure, premises, enclosure or other place (except a public thoroughfare) within the city, where automobiles, autocars or any similar self propelled vehicles, owned and operated by and for the private use of the owner or owners, lessee or lessees of such building, structure, premises, enclosure or place, or lessee of a portion of the premises on which such garage is located, are stored or parked in a condition ready for use."

Cars which are operated for hire are not "owned and operated by and for the private use of the owner." Hence, Section 260 does not exclude the class of places in question from the definition of "public garages."

You state that the owners of certain of these garages insist that we are giving an arbitrary definition to the words "public garage." The same thing was urged by these parties while the writer had this question under consideration. Of course, the validity of the ordinance is an entirely different question from the interpretation of the language. It would seem at first blush as though there could be no doubt as to the right of the city to include the garages of common carriers among public garages, but we will take that question up later if and when it becomes necessary to do so.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Withdrawal of Frontage Consent To Move House After
Permit Is Issued Is Not Grounds for Withdrawal
of Permit.**

Chicago, April 14, 1924.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

We have your letter of April 4, 1924, concerning Permit J-10649 issued on March 14, 1924, to Joseph P. Kwiakoski, a licensed house mover, to move a frame building from 2144 to 2139 South Halsted street. We note from your letter that the petition for the permit contained the requisite frontage consents, and that after the permit issued, Henry L. Fick, one of the consenting property owners, withdrew his signature from the petition. You inquire whether you should consider the withdrawal. It is not stated in your letter, but we assume that the withdrawal, if proper, would not leave sufficient frontage consents still in force to validate the permit.

Our answer to your inquiry is that you should not consider the withdrawal of the signature, and further that such attempted withdrawal is without the effect of invalidating the permit. Frontage consents are by Section 923 of The Chicago Municipal Code of 1922 made a condition precedent to the issuance of the permit. Such consent is in the nature of a power of attorney and is jurisdictional in its effect, in that it authorizes the issuance of the permit, subject to the other conditions and limitations of the ordinance. And like any other power of attorney, it may be revoked before acted upon, but not afterward. *Littell et al. v. Board of Supervisors*, 198 Ill. 205; *Theurer v. The People*, 211 Ill. 296.

This question has heretofore been considered by this office on several occasions and has always been determined in accordance with the rule above announced, and we, therefore, refrain from an exhaustive discussion of it here. Opin-

ions of the Corporation Counsel and Assistants, July 17, 1923, p. 369, op. by Max M. Korshak; December 7, 1914, p. 198, op. by Leon Hornstein; February 24, 1915, p. 339, op. by Bryan Y. Craig.

You are, therefore, advised that the attempted withdrawal of the signature of Henry L. Fick to the petition on which the permit is based is without legal force or effect, and the permit should be regarded as valid and effective for all purposes of its issuance.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

City Vehicle Tax on Vehicles Owned by the State of Illinois.

April 15, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

Your request for an opinion as to the City's right to compel drivers of vehicles owned by the State of Illinois to procure and display city vehicle license tags was referred to the undersigned for consideration and reply.

This inquiry has reference to state-owned vehicles which are operated almost exclusively on the streets of Chicago. The ordinances make no exemption except in the case of the

Chicago Public Library and the Municipal Tuberculosis Sanitarium.

There is no law under which the state can be required to pay a vehicle license fee and take out the tag for a vehicle belonging to it which is operated for state purposes. Where an actual service is rendered the state, such as supplying it with water, or paving a street in front of a state building, the state invariably pays for it when proper application is made for payment through the Court of Claims. But this will hardly apply to a license fee of this kind. On the other hand if there is anything in the ordinances which makes it necessary, in the interest of good order or the regulation of traffic, that something should be done by the state authorities, such as the affixing of tags on state-owned vehicles, etc., we believe these authorities will comply if they are notified of such provision in the ordinance.

It has been our experience that, in all matters where we deem it proper that either the Federal authorities or the state authorities should comply with a city ordinance that we could not enforce against them, these officers will comply upon proper notice being given. There is a species of comity existing among the various governmental authorities which controls in such matters, and there is usually a prompt compliance, on the theory that government agents will not evade any law that can be enforced against others.

We therefore recommend that no attempt be made to compel state officers to take out licenses, but that they be requested to so mark their cars that they show ownership and official use.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Payment of Cost of Removal of Public Utility Equipment When Street Is Vacated—Vacation of Street—Title To Property Vacated.

April 15, 1924.

HON. JOSEPH O. KOSTNER, Chairman, Committee on Local Industries, Streets and Alleys.

Dear Sir :

We have your letter of April 11th asking to be advised whether it is mandatory upon the City Council to make provision in ordinances vacating streets and alleys concerning the expense of removing whatever public utility equipment may be in the particular street or alley before the ordinance is passed. You state that "both the Chicago Telephone Company and Commonwealth Edison Company desire to have the beneficiary pay for the removing of any equipment structures that the Public Utility Corporation may have in the street before the ordinance is passed." You also state that up to the present time "we have not been putting these conditions in the ordinance, but have been holding up the ordinance pending agreement between the Public Utilities Corporation and the beneficiary."

The only question raised by your inquiry is one of private property rights as between the public utility company involved and the owners of the lots abutting on the vacated street or alley. The use of the word "beneficiary" in connection with the vacation of streets is extremely misleading and inconsistent with the legal conception of vacation, as will hereinafter be shown.

Streets and alleys are established by either one of two methods, viz: common law dedication or statutory dedication. Common law dedication vests merely an easement in the public to the street or alley for the purposes of a public way and such other purposes of a public nature as are not inconsistent with the right of the dedicator. This easement may be created in a variety of ways, the most common and usual of which is prescription.

Section 3 of the Plat Act provides that the execution and recording of a plat shall be held to be a conveyance to the municipality, in fee simple, of the streets and alleys shown on the plat. A proceeding under this section is a statutory dedication. The public interest acquired by common law dedication is inferior to that acquired by statutory dedication, and, therefore, what is hereinafter said concerning the determinability of the city's interest in streets and alleys established by statutory dedication is applicable to common law dedications alike.

In construing Section 3 of the Plat Act our Supreme Court has held that it vests in the municipality not a fee simple title absolute but a qualified, base, or determinable fee, which may continue forever but which is determined by the vacation of the entire plat or any street or alley or portion thereof in the tract. *Prall v. Burckhardt*, 299 Ill. 19, and cases there cited. That is to say, that upon passage of a vacating ordinance, all the right, title and interest of the city in and to the vacated portion is surrendered and abandoned. A vacation is no form of conveyance. It is a mere relinquishment or abandonment and runs to no one. In legal contemplation a street or alley is vacated because there is no longer public need for it as such, and the validity of a vacation ordinance turns on the nature of the purpose for which the street or alley is vacated. The city cannot convey any part of a street to a private individual, and whenever this is sought to be done under the guise of vacation, the ordinance is undoubtedly invalid and will be set aside upon a proper showing.

Section 2 of the Vacation Act provides that when a street or alley is vacated the lot lines of the abutting owners on either side shall extend to the center of what was formerly the street or alley. In other words, the title to the vacated space reverts to the abutting owners, not by virtue of the legislative intent that may have prompted the vacating ordinance, but solely by reason of this section of the Act. For a great many years our Supreme Court held this section invalid, and further held that the title to such space reverted to the own-

ers of the abutting lots at the time the dedication was made. But in the case of *Prall v. Burckhardt*, 299 Ill. 19, *supra*, that court expressly repudiated its former holdings and followed the statute, and so far as we are able to learn, the statute is still the law.

Thus far in these deliberations, therefore, it is established that upon vacation the fee simple title to the vacated space is vested in the abutting owners, and that all the right, title and interest of the city is unqualifiedly terminated. It remains to be considered what are the rights, if any, of the utility companies?

The companies mentioned in your letter acquired their rights under contract ordinances which the Supreme Court has held gave them merely a license to use the streets and alleys for the purposes of their undertaking. The companies, therefore, claim *under* the city and consequently could acquire no greater rights than the city itself had. The city had a base or determinable fee, and it is the law of this State that the determinable quality of the fee of the first taker follows any transfer by him, either of the fee or of any right or interest therein. *Blackstone v. Althouse*, 278 Ill. 481; *Becker v. Becker*, 206 Ill. 531; *Williams v. Elliott*, 246 Ill. 548; *Underhill on Wills*, Sec. 507. It follows, therefore, that when the interest of the city terminates, the interest of the utility companies claiming under the city, also terminates, and the street or alley vacated becomes the private property of the abutters without the burden or lien of any right or interest of the companies. The continued maintenance of equipment or structures of the utility companies in such space is, therefore, a trespass or a nuisance and is maintained without warrant or authority of law. It is a necessary consequence of this conclusion that the abutters are not properly chargeable with the cost of replacing or removing such equipment. Inasmuch, therefore, as the law determines that the utility company should bear the expense the question can no longer be regarded as debatable and there would seem to be no reason why any mention of it should be made in the ordinance. Any such reference in a vacation ordinance, though not conclusive

on the point, might easily tend to support a contention that the vacation was made for a private purpose and not for the purpose the law ascribes to a vacating ordinance, and consequently should be studiously avoided.

However, the rights and interests of the utility companies in such situations should be carefully considered to the extent that in authorizing the use of streets and alleys by utility companies the city actually devotes the street or alley to a public use. Since the theory of vacation is that a public need or use no longer exists for the continued maintenance of the street or alley as such, it should be carefully considered whether or not the public interest will suffer by reason of interference with or removal of public utility equipment. It may also be considered whether or not the expense of such removal will be prohibitive and thus tend to lessen the ability of the company properly to render public service. If cases arise wherein it appears that such cost would be prohibitive to the extent of making the passage of such an ordinance inadvisable and but for which fact the Committee would recommend the passage of the ordinance, it would be proper for the abutting owners to remove this bar by agreeing to assume the expense themselves if they so desire. This would be appropriately done by agreement between the abutters and the company; the city would not be a party to such an arrangement except in so far as your Committee may deem it wise and proper to discuss the matter with the interested parties in those cases where your Committee feels that the street or alley should not be vacated because of the public inconvenience resulting from the removal of the equipment of the prohibitive cost of doing the work. These are questions of legislative discretion that will necessarily have to be determined according to the facts and equities of each particular case.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

License Fees of Garage Owner Who Operates a Filling Station.

April 15, 1924.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

We have before us your request for an opinion on the amount of the license fee which should be collected from a garage owner who also operates a filling station in the space immediately within the curb in front of his garage.

The filling station has a tank of 1,000 gallon capacity, while inside of his garage he has a tank with a capacity of 285 gallons. The question is whether he is to be charged a license fee for the filling station which is based on a capacity of 1,285 gallons.

We do not think the City would be justified in depriving this party of his privilege of having a tank within his garage, on which no extra fee would otherwise be collected, merely because he also operates a filling station. The use of the tank within the garage is designed to be for the accommodation of his garage customers, whom he has the right under the ordinances to serve in this way. The filling station is operated for the public generally and for this he pays the filling station license fee.

We therefore advise you to treat the two tanks the same as if operated from two distinct businesses.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

INDEX.

References are to pages.

ACCOUNTS

Changing accounts on Comptroller's books when licensee has assigned rights to license	360
Comptroller not obliged to check reports of Chicago Surface Lines, except by Council's order	764
Northwestern Elevated R. R. Co., compensation to City from—Gross receipts	721

ADVERTISEMENTS

Contract for advertisement of matters required by law—letting of	628
--	-----

ADVERTISING

Samples, distribution of—for advertising purposes	205
---	-----

ALLEYS—See also Streets

Board of Education, right of—to close alley.....	857
Closing does not constitute abandonment by city....	468
Telegraph poles in vacated alley—compensation to telegraph company for removal of	718
Use of public alley should not be abridged	576

AMBULANCE

Service provided by city	466
--------------------------------	-----

AMUSEMENTS

Appearance of notorious criminal on stage, not permitted	409
Boxing exhibition a violation of law	534
Carnivals—illegal to use streets for	415
Dry Cabaret Ordinance—licenses for restaurants permitting dancing	180
Closing Law, One O'clock—repeal of	101
Licenses required from cabarets and restaurants permitting dancing	180
License, revocation of—places improperly conducted, prior to court's decision	102
Marathon dances unlawful	64
Proximity of lodge hall to church	469
Public golf course charging fee, license for.....	260
Tents, permits for—authority of Building Department to require	186

ANIMALS, DEAD

Contract for removal—loading stations	436
---	-----

ANNEXATION

- Fixed term franchise to railway company does not terminate upon annexation 542
- Norwood Park election illegal, because not held within time prescribed by statute 546

ANNUITIES—See Pensions

APPOINTMENTS

- Assistant Supervisor of Playgrounds—authority of Board of Education to appoint non-resident of city as..... 579
- Board of Education not subject to statutory provisions governing appointments to city offices..... 789
- Oil Inspector and deputies—power of Council to appoint.. 815
- Third Assistant Superintendent of Streets 211

APPROPRIATIONS

- Additional, after passage of Annual Appropriation Bill.... 123
- Citizen killed by policeman—for relations of..... 241
- Corporation Counsel's office 177
- Interest from special assessment funds—use of 202
- Psychopathic laboratory 709
- Quarry condemned for dump—funds appropriated before condemnation 777
- Salaries of deputy bailiffs, payment of—when no appropriation made 472
- Shifting in a department before July 1st 123
- Transfer of funds from salary accounts to other accounts 323
- Transfer of funds within department, by ordinance 322

ASSESSMENTS—See also Taxes

- Bond covering special assessment vouchers, lost or stolen 540
- City's lien on purchases made at sale for delinquent special assessments—protection of City's interests 783
- Certification of rolls, judge's—not required 687
- Electric light poles, wires and conduits—payment for.... 366
- Fire alarm and police boxes—rearrangement and relocation of 791
- Funds from special assessment cannot be used to benefit property owners assessed 535
- Interest made from special assessments—use of..... 202
- Parks, large—City cannot levy special assessment against 792
- Payment for extra pavements out of special assessment fund—unlawful 332
- Photographic copy—judge's certification not required on assessment rolls 687
- Public Library, City cannot levy special assessment against—for street improvements 786

Spreading of assessments for trifling amounts.....	171
United States Government—delinquent assessment on land belonging to	817
ATTORNEY	
Jurisdiction of Corporation Counsel over attorneys in vari- ous City departments	711
Special counsel engaged by Corporation Counsel—neces- sity for and expense of	177
BAILIFFS	
Salaries and number—Municipal Court has power to de- termine	615
Salaries of deputies—no appropriation made	472
BANKS—See Depositaries	
BARBER SHOPS	
Sunday Closing Law—validity of	623
BATHING BEACHES	
Bulkhead cutting off access to lake	144
Loss of City's rights to Clarendon Beach by construction of lake boulevard	454
BEVERAGES	
Medicine containing high alcoholic content	568
BIDS	
Patented and non-patented devices—power of City to pur- chase	690
BILLIARD ROOMS	
Card playing prohibited	650
BOARD OF EDUCATION	
Alley—right to close	357
Appointments not subject to statutory provisions govern- ing appointments to City offices	789
Assistant Supervisor of Playgrounds—authority to appoint non-resident of City as	579
Employes, authority to suspend for more than 30 days pending hearing of charges	759
Fees, payment of various—to the City	258
Resignation of members—status of	160
BOARD OF LOCAL IMPROVEMENTS	
Foundry, City has no power to operate—for manufacture of castings for streets	352
BONDS	
Depositary, City—authority of Comptroller to reduce bond of	296
Employes in Comptroller's office	154

Liability of Southern Surety Co. on bond of City Collector, for failure of a principal clerk	614
Motor vehicle offences—amount of cash bond	339
Policemen's Pension Fund—registration.....	802
Proceeds of general corporate fund unlawfully used for water fund purposes	410
Special assessment vouchers lost or stolen	540
Surety, mutual insurance company may act as—on depositary bonds	553
Withdrawal of bonding company from City official's bond	541
BOXING	
Violation of law	534
BRIDGES	
Damages, claim for—account closing for repairs	748
Fixed—over Chicago River	192
Fixed for movable, City's power to substitute—over Chicago River	193, 246
Interstate Commerce Commission has no jurisdiction....	741
Jurisdiction of City and Sanitary District—construction at S. Crawford Ave. and Drainage Canal	34
Opening and closing—power of City to regulate	743
Patented bridge in proposed viaduct at Roosevelt Road—right of City to use	647
Sanitary District, authority of—to build approach to bridge on private property	114
Sanitary District—liability of City for damages to.....	127
Tenders not entitled to police commissions	439
Title of operator, change in	813
BROKER, REAL ESTATE	
Sale of land by owner, not a brokerage business.....	750
BUILDING LINE	
Front street line—what constitutes.....	609
Interpretation of Zoning Ordinance as to existing buildings	773
BUSES	
Illinois Commerce Commission has no jurisdiction when used for club members only	757
License buses running into City from other states—City has power to	107
License for buses running upon "fixed routes".....	103
CABARETS	
Licenses for restaurants permitting dancing	180
CANALPORT	
Streets—rights of City in	728

CANDY SALES BOOKS—See Gambling	
CARD PLAYING—See Gambling	
CARNIVALS	
Prohibited on City's streets	415
CEMETERIES	
Condemnation for street—right of City	830
CERTIFICATES	
City's lien on purchases made at sale for delinquent special assessments—protection of City's interests	783
CERTIFICATES OF CONVENIENCE AND NECESSITY	
Chicago North Shore & Milwaukee Elevated Co.—rights against City	500
Franchise, municipal—certificate does not obviate necessity for	502
CHARGES	
Trial by Civil Service Commission, costs of—City not liable for	855
CHARITIES	
Water rates—exempt from payment of	697
CHICAGO LAKE SHORE & SOUTH BEND RY. CO.	
Fares—change in	803
CHICAGO, MILWAUKEE & ST. PAUL RY. CO.	
Subway, power of City to compel railway to construct— at Wrightwood Ave.	795
CHICAGO RIVER—See also Bridges, Riparian Rights	
Interstate Commerce Commission—jurisdiction of	741
CHICAGO SURFACE LINES	
Accounts, Comptroller not obliged to check—unless ordered by Council	764
Amount due City as 55 per cent of divisible net proceeds from 1920 to 1923	662
Forfeiture Suit	420
CHICAGO TUNNEL COMPANY	
Removal or relocation of tunnels—City has authority to compel	5
CHICAGO AND NORTHWESTERN RY. CO.	
Tracks on Illinois street—power to retain without City's consent	705
CHURCHES	
Lodge halls—proximity of	469
Parking space within 200 feet—not permitted	797
CITY COUNCIL	
Books and papers—cannot compel production of	92

CIVIL SERVICE—See also Employees

Charges against employes—suggestions as to	266
Employe cannot be suspended for more than 30 days..109,	129
Employe, reinstatement of—compliance with writ of mandamus	116
Salaries of employes while unlawfully suspended.....	129
Trial by Commission, costs of—City not liable for.....	855

CLAIMS

Costs of trial by Civil Service Commission—City not liable for	855
Delinquent special assessments on foreclosed property—protection of City's claims	118
Estoppel—elevated railroad companies' claims against City	525
Expert services, payment for—Michigan Boulevard improvement	787
Public utility companies—collection from	244
Set-off claim of City account money owed City by same corporation	388

CLOSING LAW

Barber shops—validity of law affecting	623
Cabarets—repeal of One O'clock Law for	101

COMMONWEALTH EDISON COMPANY

Telegraph poles, no compensation for removal of—in vacated alley	718
Telegraph poles, relocation of—abutting land owners' rights	806

COMPTROLLER

Bond of City depository—authority to reduce	296
Chicago Surface Lines Account—not obliged to check—unless directed by council.....	764
Grand Jury's subpoena to produce vouchers, etc.—compliance with	243
Payment of voucher in favor of corporation which has ceased to do business	847

CONDEMNATION

Cemeteries—authority of City	830
Payment for condemned property out of funds in City treasury	341
City property, City has power to dedicate for street—notwithstanding condemnation by railroad company for right of way	692
City property used for another purpose by City	460

CONSTRUCTION

Night work on viaduct—City's power to require	280
Time work is performed is essence of contract	371

CONSUL, SERBIAN

Vehicle license—exempt from	646
-----------------------------------	-----

CONTRACTS

Advertisement of matters required by law—bids for.....	628
Automobile for Fire Department—purchase of	417
Benefits—effect of acceptance of	311
Commissioner of Gas and Electricity—no power to let contracts	69
Commissioner of Public Works—power to let contracts without Council's specific authority	199
Comptroller's signature necessary	288
Corporation not licensed to do business in state.....	49, 451
Dead animals—removal of	436
Effect—when in	309
Globe holders—purchase of	287
Invalid—retention of benefits	289
Junk, sale of—power of Council to rescind	400
Patented and non-patented devices—power of City to purchase	690, 770
Payment for work in constructing police and fire engine houses	70
Permits, revocation of—for violation of contract	371
Time work is performed is essence of construction contract	371

CORONER

Decedents, effects of—taken by police	826
---	-----

CORPORATION COUNSEL

Jurisdiction over attorneys in various City departments	711
Special counsel, necessity for and expense of	177

COUNTY COURT JUDGE

Salary, payment of—to temporary judge holding office under order of County Court	641
--	-----

COUPONS

Distribution in bottles of Orange Crush illegal	544
---	-----

DAMAGES

Bridge closed for repairs—claim account	748
Citizen killed by policeman—City not liable to relations of	241
Fixed for movable bridges over Chicago River, substitution of—liability of City on account of.....	246
Policeman—liability of City account property damaged by	303
Property damaged, payment for—out of funds in treasury	341
Vacation of streets and alleys	206

Vacation of streets—liability of City to abutting land owners	840
Water tunnel—liability of City account damages to property in constructing.....	563
DANCES	
Marathon dances unlawful	64
DEAD ANIMALS	
Contract for removal—loading stations	436
DECEDENTS	
Effects taken by police—turned over to Coroner, not Police Custodian	826
DEDICATION	
Railroad company's condemnation of street for right of way does not prevent dedication by City	692
DEPOSIT	
Transfer of contractor's accounts—allowable after deduction for inspection fees	784
DEPOSITARIES	
Bond, reduction of—authority of Comptroller	296
Bonds—mutual insurance company may act as surety on	553
Failure of bank—procedure to protect City's interests....	771
Reorganized under different name	110, 111
DISTANCES	
Zoning Ordinance—computation under	775
DOCKS	
Ordinance of 1869 establishing dock lines on Chicago River—Status of	351
DOCUMENTS	
Comptroller's compliance with Grand Jury's subpoena to produce vouchers, etc.	243
DOGS	
Rabies, affected with—removal to pound	124
Vicious—when police may impound	844
DRAINAGE CANAL	
Jurisdiction of City and Sanitary District over construction of bridge at S. Crawford Ave.	34
DUMP	
Acquisition of land by City.....	208
City limits, outside of—City's authority to purchase land—Consent of trustees of township	307
Quarry in residential district, power of City to purchase—appropriation prior to condemnation	777
ELECTRIFICATION	
Ordinance relating to Chicago, Milwaukee & St. Paul Ry. Co.	485

ELEVATED RAILROADS

Claims by estoppel against City	525
Compensation to City—gross receipts	721
Fees for inspection of new viaducts—liability to City for	390
Northwestern Elevated R. R. Co., authority of—to maintain Ravenswood branch from Western Ave. to Kimball Ave.	801
Passengers and mails only—grants from City authorizing carriage of	475
Passenger service, compelled to provide—to Union Loop	486
Platforms—extensions of	549
Regulation of operation by City	212
South Side Elevated Ry., right of—to succeed to licenses of Chicago & South Side Rapid Transit Co.	480

EMINENT DOMAIN

Where new use of public land would destroy land for old use—land cannot be condemned	830
--	-----

EMPLOYES—See also Pensions

Bailiffs, number of—Municipal Court's power to determine	615
Board of Education, power of—to suspend for more than 30 days pending hearing of charges	759
Bonds, form of—in Comptroller's office	154
Charges against Civil Service employees—suggestions re	266
Invention of City employe, City's power to use—without paying royalties	141
Laid off account lack of work	306, 365
Psychopathic Laboratory—under jurisdiction of City....	710
Reinstatement	
Fire Department officials improperly discharged.....	239
Through writ of mandamus	116

Salaries

Bailiffs

Municipal Court has jurisdiction	615
Payment when no appropriation made	472
Payroll, Necessity of Comptroller to honor	321
Overtime in Election Commissioners' office—payment to regular employes for	54
Payment by check instead of cash.....	231
Raised after passage of annual appropriation bill	121
Recovery of salary when unlawfully prevented from performing duties	606
Suspended unlawfully—paid while	130

Suspended

Cannot be suspended for more than 30 days	109, 130
Charges—authority of Board of Education to suspend for more than 30 days pending hearing of	759

Unlawfully—salary paid	130
Trial by Civil Service Commission—City not liable for costs	855
ENGINEER, CITY	
Status of position	173
ENGINEERING SERVICES	
South Water Street improvement	31
EXAMINATIONS	
Bridge tenders	813
Chief Clerk—necessity of promotional examination for..	298
Promotional, Civil Service Law—when must be held	403
EXPERTS	
Board of Local Improvements—payment of real estate experts employed by	32
Claim for services in connection with Michigan Boulevard improvement	787
EXTENSIONS, STREET RAILWAY	
City's right to require—necessary procedure	446
FARES	
Chicago, Lake Shore & South Bend Ry. Co.—change in passenger rates	803
Chicago Surface Lines forfeiture suit	420
FEES	
Board of Education, Liability of—to pay City elevator inspection fees	258
Insolvent concern—collection from	62
Inspection fees from cold storage warehouse, City has power to collect—notwithstanding State fee	688
Liability of elevated railroad companies to City for inspection of viaducts	390
FILLING STATIONS	
Garage operated on same premises—no additional license fee for tank in	868
Garage, operation by—incidentally	229
Gasoline tank, permit for—on frontage consents secured 1½ years ago and after abandonment of tank.....	624
Permit issued—withdrawal of names from petition before	354
Permit on application presented before passage of Zoning Ordinance	357
FINANCES	
Employes, discharge of—to reduce City's expenses.....	124
FINES	
Motor Vehicle Act, for violations of—disposition	434
Municipal Court—refund	262

FIRE ALARM BOXES

Illinois Bell Telephone Co., City not obligated to—account
relocation of cable, etc. 827

Residents benefited not required to pay for rearrangement
of boxes 791

FIREARMS

Park motorcycle policemen—right to carry arms 59

FIRE DEPARTMENT

War tax on purchase of automobile..... 416

FIREMEN'S PENSION FUND—See also Pensions

Attorney of Board of Trustees subject to Corporation
Counsel 801

Board of Trustees—legal status of 593

FIRE STATION

Authority of City to construct building on stub end of
Lake street 37

FOREST PRESERVE

Hospital located nearby 150

FORFEITURE SUIT

Chicago Surface Lines—traction matters 420

FOUNDRY

City has no power to manufacture castings to be used by
Board of Local Improvements 852

FRANCHISES

Annexation does not terminate fixed term franchise to
street railway 542

Certificate of convenience and necessity does not obviate
necessity of Municipal franchise 502

Illinois Public Utilities Commission has no power to grant
—City has power 513

FRONTAGE CONSENTS

Comptroller—power to sign 158

Contract to sign—invalid 630

Filling stations—dry cleaning establishments 149

Gasoline tank—consents secured 1½ years ago 624

Names from petition, withdrawal of—before permit is
issued 354

Names from petition, withdrawal of—after permit is issued 861

Real Estate Agent, City—power to sign 156

Undertaking establishments and morgues 188

FUNDS—See also Pensions

Interest accrued from special assessments—use of 202

Proceeds of general corporate fund unlawfully used for
water fund purposes 410

Property owners assessed—funds cannot be used to benefit 535

School and library—Treasurer's accounts	197
Vehicle Tax Fund—expenditures from	729
FURLOUGHS	
Disability, account of—considered in computing pension rights	708
Pension rights—time spent on leave, computed in determining	547
GAMBLING	
Candy sales books, distribution of—not a lottery	655
Card playing in pool or billiard rooms—prohibited	650
Coupons distributed in bottles of Orange Crush—illegal	544
GARAGES	
Filling station, operation of—incidentally	229
Filling station operated on same premises—no additional fee for gasoline tank in garage	868
Hospital, prohibited within certain distance from	363
House of Good Shepherd—may be located near	575
Public carriers subject to ordinance regulating public garage	358
GARBAGE	
Acquisition of land for municipal dump	208
City limits, outside of—City's authority to purchase land—consent of trustees of township	307
Insurance, public liability—on garbage teams employed by City	651
GAS PIPES	
Illinois Commerce Commission cannot compel companies to lay in City streets	403
GAS RATES	
Payment of gas bills by City under protest, when Illinois Commerce Commission has raised rates	438
GASOLINE TANK	
Filling station and garage on same premises—no additional fee for tank in garage	868
Permit on frontage consents secured 1½ years ago and after abandonment of tank	624
GOLF COURSE	
License where fee is charged	260
GRAND JURY	
Comptroller's compliance with subpoena to produce vouchers, etc.	243
GRANTS	
Assignability—not without consent of City	478
Chicago, North Shore & Milwaukee R. R. Co.—claims against City	475

Passenger service conducted by Chicago, North Shore & Milwaukee R. R. Co.	481
GREASING RACK	
Permit to erect—necessity of	234
HOMES	
Garage may be operated near house of Good Shepherd	575
Morgan Park Home for Delinquent Children—exempt from City license	464
HOSPITALS	
Forest Preserve—location near	150
Garage prohibited within certain distance—City Infirmary	363
United States Government—not exempt from payment of water rates	51
Water rates—exempt from	268, 697
HYDRANTS	
City cannot recover for value of hydrants and water mains in vacated street	407
ICE	
Ordinance regulating sale—avoirdupois weight	753
ICE PLANT, MUNICIPAL	
Authority of City to establish and maintain	319
ILLINOIS BELL TELEPHONE CO.	
Fire alarm and police cable—City not obligated to pay for relocation, etc.	827
ILLINOIS CENTRAL R. R. CO.	
Permit, form of—for work on East 71st street	693
Tunnel under viaduct—City's power to compel placing... ..	679
ILLINOIS COMMERCE COMMISSION	
Buses used for club members only—no jurisdiction over	757
Gas bills paid by City under protest when rates raised... ..	438
Gas pipes in City streets—cannot compel gas company to lay	403
Public utilities, regulation of—within the City	228
ILLINOIS PUBLIC UTILITIES COMMISSION	
Chicago North Shore & Milwaukee Elevated Co.—rights against City	500
Franchise—no power to grant	513
ILLINOIS, STATE OF	
Vehicle tax on vehicles owned by State.....	862
INJUNCTION, WRITS OF	
Procedure in serving writs under Illinois Prohibition Act	433
INSPECTION	
City elevator inspection fees—payment by Board of Education	258

Cold storage warehouse, City's power to collect fees from, notwithstanding State fee	688
Fees, collection of unpaid—from insolvent concern.....	62
Fees for inspection of new viaducts—liability of elevated railroad companies to pay.....	390
Oil Inspector and deputies—appointment by Council ...	815
INSPECTORS—See Inspection	
INSURANCE	
Garbage teams employed by City—Equitable Casualty Underwriters' policy on	651
Surety on depositary bonds—mutual company may act as	553
INTEREST	
Special assessment funds—use of interest accrued from..	202
INTERSTATE COMMERCE COMMISSION	
Bridges over Chicago River—no jurisdiction	741
INTRASTATE STREET RAILWAY	
Fares—change in	803
INVENTIONS	
Royalties—City's right to use invention of City employe without paying	141
JOHN WORTHY SCHOOL	
Reconstruction financed by Police Department funds	312
JUDGES	
Salary, payment of to temporary judge holding office under order of County Court	641
JUDGMENTS	
Payment of final judgments of condemnation	341
JUNK	
Contract for sale—power of Council to rescind	400
JUSTICE OF THE PEACE	
Search warrants in Chicago—justice outside of Chicago has no power to issue	726
JUUL LAW	
Repeal—advisability of	56
JUVENILE DETENTION HOME	
Reconstruction financed by Police Department funds ...	312
LAW DEPARTMENT	
Corporation Counsel's jurisdiction over attorneys in various City departments	711
Special counsel—necessity for and expense of	177
LEASES	
Expired—status of tenancy when City holds over	299
Illinois Central R. R. Co. and Michigan Central R. R. Co. with Goodrich Transit Co. in violation of agreements with City	779

Property of concessionaire on Municipal Pier, right of City to—after expiration of lease	57
Restaurant concession on Municipal Pier—validity of lease for	335
LICENSES—See also Permits	
Amusements improperly conducted—revocation of license prior to court's decision	102
Assigned rights—changing accounts on Comptroller's books when licensee has	360
Beverage, retail—at location for which similar license is in existence	356
Buses running into City from other states	107
Buses running upon "fixed routes"	103
Cabarets and restaurants permitting dancing	180
Cigarettes sold in different locations of same building. .394,	781
Checks upon which payment has been stopped	406
Chicago, North Shore & Milwaukee R. R. Co.	527
Classification of provisions as to probability of enforcement	270
Ferris wheel, alderman's permission required—for use of	203
Filling station permit issued before passage of Zoning Ordinance—validity of	357
Foreign corporation transacting business in Illinois	453
Gasoline tank abandoned for some time—frontage consents secured 1½ years ago	624
Gasoline tank in garage on premises where filling station is operated	868
Golf course, public—charging fee.....	260
Greasing rack, automobile—necessity of permit to erect	234
Home for delinquent children—exempt	464
Illinois, State of—City vehicle tax on vehicles owned by	862
Motor cabs—issued only to owners of	47
Real estate owner selling his own—not required to pay fees for his agents	750
Rebate to licensee who delays payment until fee has been raised — invalid	658
Restaurants not required to provide wash rooms and lavatory	467
Restaurants—power of Council to license	414
Restaurants permitting dancing	180
Revocation account violation of contract—Broadway system of sewers	371
Semi-trailers not separately licensed.....	643
Serbian Consul who is not citizen, exempt from vehicle license	646
Size of vehicle license plates	325

South Side Elevated Ry. Co., right of—to succeed to licenses of Chicago & South Side Rapid Transit Co.....	480
Undertaker may employ agents who are not licensed undertakers — when	383
Undertaking establishment, operation of—after death of licensed proprietor, by unlicensed members of corporation	378
Wearing Apparel Shop Ordinance—construction of phrase “Number of persons engaged”	283
LINCOLN PARK COMMISSIONERS	
Special assessments, City has no power to levy—against large parks	792
LIQUOR	
Distribution by policemen—merits of case	632
Medicine containing high alcoholic content permitted—provided not a beverage	568
LITERATURE	
Obscene publications—what constitutes	845
LODGE HALLS	
Churches—in proximity of	469
LOOP, UNION	
Passenger service—elevated roads compelled to provide	486
LOTTERIES—See Gambling	
MANHOLE COVERS	
Patented device, City has power to purchase—when bids submitted cover non-patented devices	690
MARATHON DANCES	
Unlawful	64
MEDICINE	
Alcoholic content, high—sale permitted provided not a beverage	568
MILK BOTTLES	
Sizes permitted	537
MORAL OBLIGATION	
Payment of claims by City	856
MOTOR VEHICLES	
Cash bonds required—amount of	339
Fines for violation of Motor Vehicle Act—disposition of	434
Licenses issued only to owners of cabs	47
Semi-trailers not separately licensed	643
Weight of load on truck—maximum	195
MUNICIPAL COURT	
Bailiffs—power to determine number and salaries of	615
Fines and forfeitures, refund of—remitted	262

MUNICIPAL PIER

Docking space—City's power to lease	81
Leases for recreation purposes	132
Leases, void—assignment of	169
Rent of space, issuance of vouchers for—by Chicago Steamship Line	440
Restaurant concession—validity of lease for	335
Structures erected by concessionnaire, right of City to— after expiration of lease	57
Warehouse, power of City to operate—warehouse receipts	557

NEWSPAPERS

Contract for advertisement of matters required by law— letting of	628
Indecent news matter prohibited	470

NILES CENTER

Chicago must furnish water to.....	551
------------------------------------	-----

NORTHWESTERN ELEVATED R. R. CO.

Compensation to City—gross receipts	721
---	-----

NORWOOD PARK

Annexation election illegal account not held within time prescribed by statute	546
---	-----

NUISANCES

Quarry in residential district—power of Council to de- termine status as nuisance.....	776
Smoke Ordinance, amendment to—penalty	183

OFFICIALS—See also Employees

Bond—withdrawing of bonding company from	541
--	-----

OIL INSPECTORS

Appointment of Inspector and deputies by Council—not subject to Civil Service Law	815
--	-----

ORDINANCES

Repealed by order—cannot be	278
-----------------------------------	-----

PARKING

Concession to individual—City may not grant	818
Homes, dance halls, theaters, etc.,—restrictions	394
Permit within 200 feet of church—cannot be issued	797

PARKS

Assessment; City cannot levy—on park property	787
City police on streets under control of park district ...	293
Motorcycle policemen—right to employ	61
Prisoners—right of Park Commissioners to house	371
Special assessments cannot be levied against Lincoln Park Commissioners	792

PATENTS

Bridge in proposed viaduct at Roosevelt Road—right of City to use	647
Contract, City has power to let—when bids submitted also cover non-patented devices	690
Construction of streets, used in—power of City limited ..	770

PAVING

Payment for street pavements out of special assessment fund — unlawful	332
Street railways, City has power to compel to repave or improve their right of way	571

PENSIONS

Amendatory Act of 1923—based on provisions of	387
Computation according to salary paid during time pension earned	328
Disability benefits—computation of	767
Disability, duty—interpretation of Police Pension Act relative to	755
Discharged illegally—time computed in determining rights	302
Discharged police captain afterwards reinstated—restoration of pension rights	592
Employee transferred to Police Department—computation of pension rights	463
Employment with contractor doing City work—not computed in determining pension rights.....	324
Furloughs, time spent on —computed in determining police pension	547
Marriage or widow, effect of—on additional pension account minor child	660
Minor child, marriage of—no effect on payments to mother	766
Minor children, payments to—effect of Amendatory Act of 1917 on	733
Minor children, widow's right to additional pension account—for period prior to Amendatory Act of 1917.....	695
Pensioner who returns to City employment—rights of ...	612
Policeman killed while on duty—merits of case	840
Policemen, rights of certain—who have not made contributions for full time	761
Police Pension Law, effect of amendments of 1915 and 1921 to—on widow of pensioner under the 1887 Act ...	639
Recovery of contributions by policemen leaving the service without serving prescribed time	711
Refund of payments to Pension Fund—right of widow whose husband died intestate	618
Refund of payments into Police Pension Fund—when pensioner is entitled to	731
Reinstatement when disability of pensioner has been removed	297

Retired employe subsequently reinstated by court order— pension must be rebated	445
Secretary of Police Department—status of pension rights	708
Temporary employes—rights of Municipal employes em- ployed as	327
Widow, right of—to pension under Law of 1877, whose husband died in 1917	588
Widow, right of—who married pensioner after he was re- tired	811
Workmen's Compensation Act—deductions from payments to beneficiaries account amounts paid under	301
PERMITS—See also Licenses	
Automobile greasing rack	234
Frontage consent, signers cannot withdraw names from— before permit is issued	631
Frontage consent, withdrawal of name from—after per- mit is issued—not grounds for withdrawal of permit	861
Illinois Central R. R. Co.—work on East 71st street	693
Obstruction of street, temporary—by abutting property owner	820
Parking concession to individual—City may not grant....	818
Parking space within 200 feet of church—not permitted	797
PLATFORMS	
Elevated railroads—extensions of	549
PLAYGROUNDS	
Eminent domain—acquisition of property by	137
POLICE—See also Pensions	
Bridge tenders not entitled to police commissions	439
Buildings, unsafe—relation of Police Department to other departments in closing	63
Citizen killed by police officer—City not liable to relations	241
Damages to property—liability of City	303
Decedents, effects of—should be turned over to Coroner, not Police Custodian	826
Injured in performance of duty—compensation from City	53
Park District—enforcement of law under control of	293
Park motorcycle officers—right to carry firearms	59
Prohibition law, violation of by officers—merits of case..	632
Writs of injunction under Illinois Prohibition Act—pro- cedure in serving	433
POLICE BOXES	
Residents benefited not required to pay for rearrange- ment	791
POLICE POWER	
Appearance on stage of notorious criminal—City can pre- vent	409

City cannot divest itself of, nor make the subject of barter or exchange	626
Elevated trains—power of City to regulate operation of	212
Gas pipes, City cannot compel companies to remove—without payment	76
Injunction to protect private interests—enforcement of	285
Viaducts, night work on—Council's power to require	280
POLICEMEN'S ANNUITY & BENEFIT FUND—See also	
Pensions	
Bonds purchased by Retirement Board—registration of	802
POOL ROOMS	
Card playing prohibited	650
PRICES	
City's control of prices charged on Municipal Pier	335
PRISONERS	
Park Commissioners, right of—to make agreement with City for keeping	397
PROBATION OFFICER, CHIEF	
Salary fixed by Council	736
PROHIBITION	
Arrests for violations committed in presence of officers	345
Medicine containing high alcoholic content may be sold provided not a beverage	568
Procedure in serving writs of injunction under Illinois Prohibition Act	433
PROPERTY, CITY	
Condemnation for another use by City	460
PROPERTY, PERSONAL	
Sale by City	401
PSYCHOPATHIC LABORATORY	
Status of	709
PUBLIC IMPROVEMENT	
Illinois Central tunnel under viaduct not a local improvement	683
PUBLIC LIBRARY	
Special assessment, City cannot levy—for street improvements	786
PUBLIC UTILITY COMPANIES	
Claims, collection of—by City	244
Removal of property in vacated street—payment of cost of	866
Removal of property in streets for purpose of subway ...	20

PUBLIC VEHICLE LICENSE COMMISSION

Ownership of Checker Cab Company's cabs—authority to determine	47
--	----

PUBLICATIONS

Indecent news matter prohibited	470
Obscene literature—what constitutes	845

QUARRY

Nuisance, whether a—power of Council to determine ...	777
---	-----

RAILROAD CROSSINGS

Permit for Illinois Central R. R. Co.—work on East 71st street	693
--	-----

RAILROADS

Chicago, North Shore & Milwaukee R. R., legal status of—operation in Chicago	474
Electrification ordinance affecting the Chicago, Milwaukee & St. Paul Ry. Co.	485
Leases made by Illinois Central R. R. Co. and Michigan Central R. R. Co. with Goodrich Transit Co. in violation of agreements with City	779

REAL ESTATE BROKER

Sale of land by owner—not a brokerage business	750
--	-----

REFRESHMENT STANDS

Removal by Council order	277
--------------------------------	-----

RESTAURANTS

License—power of Council to	414
Milk bottles—sizes permitted	537
Regulation—City denied right of.....	386
Wash rooms—validity of ordinance requiring two.....	386
Wash rooms and lavatory maintained	467

RIPARIAN RIGHTS

Bridge closed for repairs—claim for damages on account of	748
Bridges over Chicago River—Interstate Commerce Commission has no jurisdiction	741
Bridges over Chicago River—power of City to regulate opening and closing	743
Clarendon Beach—loss of City's rights to	454
Dock lines—status of Ordinance of 1869	351
Ten foot strip of land on Chicago River between Jackson boulevard and Adams street	620

SALARIES

Bailiffs, number and salaries of—Municipal Court has power to determine	615
---	-----

Bailiffs of Municipal Court—necessity of Comptroller to honor payroll for	321
Check, payment by—instead of cash	231
Chief Probation Officer—legal status of	736
Deputy bailiffs, payment of—for whom no appropriation was made	472
Employee wrongfully prevented from performing duties	606
Overtime in Election Commissioners' office—regular employees	54
Payment while unlawfully suspended	130
Raised after passage of annual appropriation bill	121
Temporary judge holding office under order of County Court	641
Transfer of funds from salary account to other accounts	323
SAMPLES	
Advertising purposes—distribution for	205
SANITARY DISTRICT	
Bridge at S. Crawford avenue and Drainage Canal—jurisdiction over construction of	34
Bridge on private property—authority to build approach to	114
Liability of City for damage to bridge	127
Water, city within District can force Chicago to furnish—though not contiguous to Chicago	551
SCHOOLS	
Water rates—exempt from	697
SEARCH WARRANTS	
Justice of peace outside of Chicago has no authority to issue warrants in Chicago	726
When not required	350
SERBIAN CONSUL	
Vehicle license—exempt from	646
SERVICES—See also Salaries	
Bills for printing and engineering services—South Water Street improvement	31
Real estate experts, payment of—employed by Board of Local Improvements	32
SEWERS	
City limits—connections for land beyond	315
Revocation of permits for violation of contract	371
SIDEWALKS	
Defective walks on premises leased by City—liability of City to repair	441
Deposit of contractor, transfer of—permitted after deduction for inspection fees	784

SMOKE ORDINANCE

- Penalty for violation 183

SOUTH WATER STREET IMPROVEMENT

- Bills for printing and engineering services 31

STATUTE OF LIMITATIONS

- Cancellation of old warrants 746

STICKNEY, VILLAGE OF

- Water supply—at point selected by City 735

STORES

- Fronting on residential street at intersection with commercial street 344
Erection of brick front addition in apartment district ... 577

STREET LIGHTING

- Contract to purchase globe holders 287
Electric light poles, wires and conduits—paid for by special assessment 366
Ornamental light system, installation of—which is found to be dangerous 361
Trolley wires—City's power to compel surface lines to raise 329

STREET RAILWAYS

- Amount due City as 55 per cent of divisible net proceeds from 1920 to 1923 662
Annexation of town to City does not terminate fixed term franchise of street railway 542
Extensions, Council's right to require—necessary procedure 446
Fares, change in—Chicago, Lake Shore & South Bend Ry. Co. 803
Repaving or improving right of way—City has power to compel 571

STREETS—See also Alleys, Vacation of Streets

- Board of Education, right of—to close alley 857
Boulevard, construction of—making useless present bathing beach 454
Canalport—rights of City in streets in 728
Carnivals—illegal to use streets for 415
Chicago & Northwestern Ry. Co.—rights on Illinois St. 705
Condemnation of cemetery—authority of City 830
Condemnation by railroad company for right of way, does not prevent dedication by City 692
Fines collected for violations of Motor Vehicle Act—used for repair and upkeep 434

Foundry, City has not power to operate for manufacture of castings	852
Illinois Commerce Commission—power and authority of	404
Obstruction, temporary—by abutting property owner ...	820
Park Commissioners—control by	294
Parking concession to individual—City cannot grant....	818
Parking of automobiles in front of homes, etc.,—Council has power to regulate	394
Patented materials used in construction work—limited power of City to purchase	770
Paving Ogden avenue from Rees street to Division street—contract for	139
Removal of public utility equipment from vacated street—payment of cost of.....	863
Repaving or improving right of way of street railway—City has power to compel	571
Rights of City in N. Melvina avenue between Dickens street and Armitage avenue	78
Special assessment fund cannot be used to benefit property owners who are assessed	535
Tunnels, compensation to City for privileges of—after abandonment	653
Tunnel, right of abutting land owner to maintain—in which City has only an easement—without paying City compensation	677
Vacation of street or alley—City can retain money deposited for	383
Vacation of streets and alleys—damages to property owners	206
Vacation of stub end of Lake street for fire station	37
Vehicle Tax Fund used for improvements, repairs and maintenance	731
Zoning Ordinance—procedure to amend.....	399

SUBPOENA

Comptroller's compliance with Grand Jury's subpoena to produce vouchers, etc.	243
--	-----

SUBWAYS—See also Tunnels

Chicago, Milwaukee & St. Paul Ry. Co., power of City to compel—to construct subway at Wrightwood avenue	795
Illinois Central R. R. Co., power of City to compel—to place tunnel under viaduct	679
Public utility company, City has authority to compel—to remove its pipes, etc., at company's expense	20
Removal or relocation of Chicago Tunnel Company's tunnels—City has authority to compel	5
Sub-sidewalk space, vacation of—for purpose of passenger subway	7

SUNDAY CLOSING—See Closing Law

SURETIES

Equitable Casualty Underwriters' policy on garbage teams employed by the City.....	651
Failure of bank—procedure to protect City's rights	771
Mutual insurance company may act as surety on depository bonds	553

SWITCH TRACKS .

Relocation of tracks on Lumber street	236
---	-----

TAG DAYS

Limited to three days each year	389
---------------------------------------	-----

TANKS, GASOLINE

Permit on frontage consents secured 1½ years ago and after abandonment of tank	624
--	-----

TAXES—See also Assessments

City exempt from payment of war tax on purchase of automobile	416
Delinquent special assessments on foreclosed property—protection of City's claims	118
Insurance companies, foreign—Supreme Court's decision	95
Personal property, exemption of—unconstitutional	80
Special assessments for trifling amounts—spreading of	171

TEAMS

Insurance—public liability	651
----------------------------------	-----

TELEGRAPH POLES

Relocation and expense of same—abutting land owners' rights ..	806
Vacated alley—compensation for removal of poles in ...	718

TENTS

Permits for—authority of Building Department to require	186
---	-----

THEATERS

Fire hazard—power of City to close on account of.....	713
Notorious criminal, appearance on stage of—not permitted	409

TRACKS

Chicago & Northwestern Ry., rights of—on Illinois street	705
--	-----

TRACTION

Chicago, North Shore & Milwaukee R. R., legal status of—operation in Chicago.....	474
Chicago Surface Lines' forfeiture suit—traction matters	420
Extensions, street railway—Council's right to require—necessary procedure	446

TRACTOR

- Semi-trailer not separately licensed 643

TRAILER-SEMI

- License, separate—not required 643

TRANSPORTATION

- Annexation of town to City does not terminate fixed term franchise to street railway 542
- Buses used for club members only—Illinois Commerce Commission has no jurisdiction 757
- Chicago North Shore & Milwaukee R. R., legal status of—operation in Chicago 474
- Chicago Surface Lines' forfeiture suit—traction matters 420
- Extensions, street railway—Council's right to require—necessary procedure 446

TROLLEY WIRES

- Raise wires—City's power to compel surface lines to ... 329

TRUCKS, MOTOR

- Load permitted on City's streets—maximum weight of 195

TUBES—See also Tunnels

- Ownership of tubes placed within tunnels after permit has expired 369

TUNNELS—See also Subways

- Abandoned—compensation to City after tunnels have been 653
- Abutting land owner, right of—to maintain tunnel under street in which City has only an easement, without paying compensation to City 677
- Illinois Central R. R. Co., power of City to compel—to place tunnel under viaduct 679
- Liability of City account damages to property resulting from construction of tunnel 563
- Ownership of tubes placed within tunnels after permits expire 369
- Remove or relocate—City has authority to compel Chicago Tunnel Co. to 5

UNDERTAKERS

- Frontage consents required—when..... 188
- Ownership of establishment by corporation and use of corporate name permitted 374
- Operation of establishment after death of licensed proprietor, by unlicensed members of corporation 378
- Unlicensed agents—when permitted to be employed 383

UNITED STATES GOVERNMENT

- Delinquent assessment on Government land 817
- Hospital not exempt from payment of water rates 51
- Vacation of streets dedicated by Government..... 45

UTILITY COMPANIES—See Public Utility Companies

VACATION OF STREETS

City cannot recover for value of hydrant and water main when street is vacated	407
Damages to abutting land owners	840
Legal principles involved	865
Lake street, stub end of—for fire station	37
Removal of public utility equipment from vacated street—payment of cost of	866
Special assessment fund cannot be used to benefit property owners who are assessed	535
Title to vacated property	838, 864
Vote of Council	839

VAULT

Compensation for maintenance under street	170
---	-----

VEHICLE TAX—See also Taxes, Assessments

Expenditures from fund	729
State of Illinois—City tax on vehicles owned by	862

VIADUCTS

Illinois Central R. R. Co., power of City to compel—to place tunnel under viaduct	679
Night work—Council's power to require	280

VOUCHER

Corporation which has ceased to do business—payment to	847
--	-----

WAREHOUSES

Inspection fee, City has power to collect—notwithstanding State fee	688
Municipal Pier, power of City to operate warehouse on—warehouse receipts	557

WARRANTS—See also Search Warrants

Cancellation after statute of limitations has run	746
---	-----

WATER

Pressure and quantity—City not required to furnish to consumer any specified	812
Sanitary District, city within—not contiguous to Chicago may force Chicago to furnish water	551
Stickney, Village of—City may select point at which to supply	735
Supply to districts outside of City	190
Tunnel—liability of City account of damages to property in constructing	563
West Hammond—duty of City to furnish to	291

WATER MAINS

Liability of City to companies for removing gas mains	72
---	----

WATER RATES

- Hospitals, universities and charities—exemption of ... 268, 697
- United States Government hospital exempt 51

WEARING APPAREL SHOP

- Ordinance—construction of phrase “Number of persons engaged” 283

WEIGHMASTER, PUBLIC

- Ordinance—validity of 273

WRITS OF INJUNCTION

- Procedure in serving—under Illinois Prohibition Act 433

ZONING

- Building line—what constitutes 609
- Computing distances 775
- Filling station permit issued before passage of ordinance
—validity of 357
- Ordinance—interpretation of 773, 799
- Ordinance—procedure to amend 399
- Ordinances repealed by Zoning Ordinance 822
- Store, erection of—in apartment district 577